TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 274.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN J. DE ATLEY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED OCTOBER 30, 1914.

(24,419)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1915.

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1–39 Be it remembered that afterwards to-wit on March 18, 1914, the appellant, Chesapeake & Ohio Railway Company by its Counsel, filed in the Clerk's office of this Court of Appeals of Kentucky, a transcript of record in words and figures following, to-wit:

40 STATE OF KENTUCKY,
Mason Circuit Court:

Pleas had before the Honorable Charles D. Newell, Judge of the Mason Circuit Court, at the court house thereof, in the city of Maysville, Ky., on the 10th day of January, 1914.

Mason Circuit Court.

JOHN J. DE ATLEY, by His Statutory Guardian, W. L. De Atley, and W. L. DE ATLEY, Guardian of John J. De Atley, Plaintiffs,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Petition.

Be it remembered that heretofore, to-wit, on the 21st day of July, 1911, the plaintiffs, by their attorneys, Holmes & Ross and A. D. Cole, filed in the Clerk's office of this Court their certain petition in words and figures following:

The plaintiffs, John J. De Atley by his statutory guardian, W. L. De Atley, and W. L. De Atley as guardian of John J. De Atley, state that the said John J. De Atley is and was at all times herein

41 mentioned an infant under the age of 21 years and a resident of Nicholas County, Kentucky, and that on the 6th day of May 1911, his father, the said W. L. De Atley, was duly appointed his guardian by the County Court of said County and thereupon qualified as such guardian and executed bond and qualified according to law and is now acting as such guardian. Copies of the orders showing his appointment and qualification are filed as part hereof marked "A."

Plaintiffs state that the defendant, The Cheaspeake & Ohio Railway Company is and was at all times herein mentioned a corporation created, organized and existing under the laws of Virginia and authorized to contract and be contracted with, sue and be sued and to carry on a general railroad business; that said defendant has at all times herein mentioned operated and does now operate a line of railroad beginning at Newport News in the state of Virginia extending through the state of West Virginia and through Mason county, Kentucky to the City of Cincinnati in the State of Ohio; and that at all

times herein mentioned said defendant has been engaged in carrying commerce over its said line of railway between said states.

Plaintiffs state that on the — day of December 1910 the said John J. De Atley was employed by defendant to serve as a brakeman on its freight trains, and at the time he entered into the service of defendant he was a boy about 19 years of age and wholly without experience in the operation of railway trains.

Plaintiffs state that the defendant, its agents and servants, carelessly and negligently failed and refused to give him any instructions, explanation or knowledge of its rules concerning the operation of any of its trains. That said defendant, its agents and servants carelessly and negligently failed and refused either to adopt
42 and promulgate or bring to his knowledge definite and adequate rules concerning the use and operation of any of its freight trains.

Plaintiffs state that on or about the 22nd day of January 1911 the said John J. De Atley was employed by defendant to act as brakeman in making a run on the train known as 'train 1st 95 Manifest," which was composed of cars laden with commerce carried therein from states other than Kentucky, and which were again assembled at Russell, Kentucky, and carried thence to Cincinnati in the State of Ohio.

Plaintiffs state that while he was so employed and engaged in the service of defendant as brakeman on said train he was directed by defendant's engineer thereon when said train was approaching the fair grounds near Maysville in Mason county, Kentucky, to go forward to defendant's tower to get orders; that for a year or more prior thereto, and during the whole time he was in defendant's employment it was the practice of defendant's servants superior in authority to the brakeman to require them, including said John J. De Atley, to leave the train while in motion and go forward to the tower for orders and return with orders to the train while in motion, instead of causing its said trains to be stopped.

Plaintiffs state that the defendant carelessly and negligently permitted said practice to exist to the increased hazard of its employes and carelessly and negligently failed and refused to adopt and promulgate a rule for the protection of its said employes against the extra hazard of such practice.

Plaintiffs state that the said John J. De Atley was on his way from the tower pursuant to the direction of said engineer
43 with orders for said train and was endeavoring to get on said train while in motion, and, while in the exercise of ordinary care, he fell under the wheels of said train and thereby his right foot was cut off.

Plaintiffs state that the injury of said John J. De Atley was caused by the carelessness and negligence of defendant, its agents and servants in failing and refusing to instruct him in regard to its rules, and in failing and refusing to adopt and promulgate definite and adequate rules concerning the use and operating of its freight trains and in failing and refusing to adopt and promulgate a rule for his protection against a practice, which said defendant, its agents and servants,

knew, or by the exercise of ordinary care, could have known existed and was extra hazardous, and especially by the carelessness and negligence of its said engineer in not stopping said train long enough to enable the said John J. De Atley safely to get aboard thereof, by reason whereof the said John J. De Atley has been damaged in the sum of -25,000, and contrary to the Statute in such cases made and provided and the amendment thereto, known as "An Act relating to the liability of common carriers by railroads to their employes in certain cases," approved by Congress April 22, 1908.

Wherefore plaintiffs pray judgment against the defendant in the sum of $25,000 and all proper relief.

HOLMES & ROSS,
A. D. COLE,
Att'ys for Plaintiffs.

44 The Commonwealth of Kentucky to the Sheriff of Mason County, Greeting:

You are commanded to summon The Chesapeake & Ohio Railway Company to answer, in 10 days after the service of this summons, a petition in Equity filed against it, in the Mason Circuit Court by John J. De Atley by his statutory guardian, W. L. De Atley and W. L. De Atley as guardian of John J. De Atley, and warn it that upon its failure to answer the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within ten days after the service thereof to the clerk's office of said court.

Given under my hand as Clerk of said Court, this 21st day of July, 1911.

JAS. B. KEY, *Clerk.*

Executed July 29, 1911, by delivering to W. W. Wikoff, he being Agent of the C. & O. Ry., a true copy of the within summons.

W. H. MACKOY, *S. M. C.*,
By M. BROWN, *D. S. M.*

At a court begun and held for the Mason Circuit Court the 8th day of January, 1913.

Plaintiffs produced and offered to file his amended petition herein, to the filing of which defendant objected and the court took time.

At a court held as aforesaid the 7th day of April, 1913.

45 The court having considered of plaintiff's offer to file his amended petition herein at a former term of this court, and being advised, overrules the objection and orders said amended petition to be filed, to which defendant excepts.

Mason Circuit Court.

JOHN J. DE ATLEY, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Amended Petition.

The plaintiff, John J. De Atley, by leave of Court, amends his petition and states that since the filing of the petition his disability has been removed by reason of his becoming of age; that prior to the injury complained of herein his father, W. L. De Atley, had emancipated him and allowed him to use and appropriate his own earnings; that the defendant, by its agents and servants, also carelessly and negligently selected and employed in its service at the time and on the occasion of the injury to plaintiff an incompetent fellow servant, to wit, the engineer in charge of the engine attached to said train, when defendant, its agents and servants knew and by the exercise of ordinary care could have known thereof in time to have prevented said injury; and that by reason also of said act of negligence plaintiff has been damaged as aforesaid.

Wherefore plaintiff prays as in his petition, that he be allowed to prosecute this action in his own name and for all proper relief.

HOLMES AND ROSS,
A. D. COLE,
Att'ys for Plaintiff.

46 At a court held as aforesaid the 18th day of September, 1913.

Defendant produced its answer here which is ordered filed. Plaintiff produced his demurrer to the third paragraph of defendant's answer herein, which is ordered filed, and the court having considered thereof and being advised overrules said demurrer, to which plaintiff excepts, and by agreement all affirmative allegations of said answer are traversed of record.

On motion it is ordered that Miss Bessie Johnson, the official stenographer of this Court, be appointed to take full stenographic notes of the testimony in this case.

This day came the parties, and thereupon came the following jury: I. N. Foster, T. A. Tuggle, R. P. D. Thompson, R. R. Hull, Chas. Crawford, Wm. Newell, J. C. Adair, Jno. R. Brodt, J. R. Downing, Wm. Downing, Ed. Kennard and Thos. Osborne, who were duly empaneled and sworn to try the issues, and at the conclusion of plaintiff's testimony, defendant moved the Court to instruct the jury to find for it, and the Court having considered thereof, overrules said motion, to which defendant excepts, and the jury aforesaid not having fully heard the case are continued until 9 o'clock tomorrow morning and are allowed to disperse after receiving the usual charge from the Court.

Mason Circuit Court.

JOHN J. DE ATLEY, by, etc., Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Answer.

47 Par. 1. Comes the defendant and for answer to the petition of plaintiff as amended, denies that at the time plaintiff entered into the service of defendant, that he was wholly or at all without experience in the operation of railway trains. It denies that it, or its agents or servants, carelessly, or negligently, or at all failed or refused to give the said John J. De Atley any or all necessary instructions, explanation, or knowledge of its rules concerning the operation of any of its trains. It states that the said John J. De Atley was furnished with sufficient instruction, explanation and knowledge of the rules concerning the operation of defendant's trains. It denies that it, or its agents or servants carelessly, or negligently, or at all, failed or refused to either adopt or promulgate, or to bring to the said John J. De Atley's knowledge, definite or adequate rules concerning the use and operation of defendant's freight trains. It states that it did adopt and promulgate and bring to the said John J. De Atley's knowledge, definite and adequate rules concerning the use and operation of its said freight trains. It denies that at the time or on the occasion mentioned in plaintiff's petition, the said John J. De Atley was directed by defendant's engineer on the train described in the petition, at a time when said train was approaching the Fair Grounds at Maysville, in Mason County, Kentucky, or at any other time or at all, to go forward to defendant's tower to get orders. It denies that for a year or more, or for any other time prior to the time mentioned in the petition, or during the whole or any part of said time, or while said John J. De Atley was in defendant's employment, that it was the practice of defendant's servants superior in authority of the brakeman, or any of its said servants, to require the said brakeman, or the said John J. De Atley, to leave the train or trains while in motion,
48 or to go forward to the tower for orders, or to return with orders to the train while in motion. It denies that the said John J. De Atley was at the time in question, or at any other time, required by defendant's engineer, or by any other servant of defendant, to leave the train described in the petition, or any other train, while in motion, or at all, or to go forward to said tower for orders, or to return with orders to the train while in motion, or at all. Defendant denies that it carelessly or negligently, or at all, permitted said alleged practice to exist to the increased hazard of its employes, or that it permitted said practice to exist at all, or that there was any such practice. It denies that it carelessly or negligently, or at all, failed or refused to adopt or promulgate a rule for the protection of

its said employes against the alleged extra hazard of such practice. It denies that there was any such practice.

It denies that the said John J. De Atley was at the time of the injury or injuries to him, on his way from the aforesaid tower, pursuant to a direction of said engineer, or that he had or was with orders for said train. It denies that the injury to said John J. De Atley was caused by any carelessness or negligence of the defendant, or its agents, or servants, in failing or refusing to instruct him in regard to its rules, or that it did so fail, or by reason of any failure or refusal to adopt or promulgate definite or adequate rules concerning the use or operation of its freight trains, or that it did so fail, or by failing or refusing to adopt or promulgate a rule against a practice, which this defendant, or its agents or servants knew, or by the exercise of ordinary care could have known existed or was extra hazardous. Defendant denies that any such practice did exist.

49 It denies that the injury to said John J. De Atley was caused in any part, or at all, by any carelessness or negligence of defendant's engineer in not stopping said train long enough to enable the said John J. De Atley to safely or at all get aboard of same. It denies that the said John J. De Atley has been damaged in the sum of $25,000.00 or any other sum.

The defendant, for answer to the petition of plaintiff as amended, denies that the defendant, by its agents or servants, or at all, carelessly or negligently, or at all, selected or employed in its service at the time or on the occasion of the injury to plaintiff, an incompetent fellow servant. It denies that the engineer in charge of said train was incompetent, or that defendant or its agents or servants knew, or could by the exercise of ordinary care, have known of his alleged incompetency in time to have prevented the said injury. Wherefore &c.

Par. 2. Defendant for further answer states that at the time and on the occasion of the accident and injury to plaintiff complained of, plaintiff was himself guilty of negligence which contributed to said accident and injury, and but for such contributory negligence on his part, the accident would not have happened nor the injury have been received. Wherefore, defendant pleads and relies on the facts herein set up as a bar to plaintiff's right to recover herein.

Par. 3. Defendant further answering states that the plaintiff, John J. De Atley, was an employe of this defendant, and that in entering and remaining in the service of this defendant, he assumed certain risks and dangers incident to the service, and by his contract of service with this defendant, he assumed all the ordinary risks and dangers incident to his employment, among which was the risk

50 of injury set up in the petition; and the defendant states that the fall which plaintiff received, and the consequent injury to plaintiff, referred to in the petition, were among the risks assumed by plaintiff in entering the employment of defendant as incident to the service and operation of railroad trains and handling of cars, and the business of railroading engaged in by plaintiff; and that said fall and injury could not have been avoided by the exercise of ordinary care or skill on the part of defendant, its agents or servants,

or any of them, but that said fall and injury was a risk assumed by plaintiff as a part of the terms of his employment; and defendant pleads and relies on the facts herein set up as a bar to plaintiff's right to recover herein.

Wherefore, having fully answered, defendant prays to be hence dismissed, with judgment for its costs herein expended.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Defendant.

Mason Circuit Court.

JOHN J. DE ATLEY, by, &c., Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Demurrer.

Comes the plaintiff, John J. De Atley, by &c., and demurs to the third paragraph of the defendant's answer herein, because same does not state facts sufficient to constitute a defense to plaintiff's petition.

A. D. COLE,
HOLMES & ROSS,
Att'ys for Plaintiff.

51 At a court held as aforesaid the 19th day of September, 1913.

Again came the parties and the jury empaneled and sworn herein on a former day of the present term who appeared and took their seats, and at the conclusion of all the testimony defendant again moved the Court to instruct the jury to find for it, and the Court having considered thereof, and being advised, overrules said motion, to which defendant excepts, and the jury aforesaid, having fully heard the case, returned the following verdict:

"We, the jury, find for the plaintiff in the sum of $9,050.00".

JOHN R. DOWNING, *Foreman.*

Now comes the defendant immediately upon the return of the verdict and before the rendition of the judgment, and moves the Court to enter judgment for it, notwithstanding the verdict of the jury, and the Court having considered thereof overrules said motion to which defendant excepts.

Wherefore, it is adjudged by the Court that the plaintiff, John J. De Atley, recover of the defendant, The C. & O. Ry. Co., the sum of Nine Thousand and Fifty Dollars ($9,050.00) with six per cent interest thereon from the 19th day of September, 1913, until paid and his costs herein expended.

Thereupon came the defendant within the time allowed by law and produced and filed its motion and grounds for a new trial herein, and the Court not being sufficiently advised took time.

52 Mason Circuit Court.

JOHN J. DE ATLEY, by, &c., Plaintiffs,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Motion and Grounds for New Trial.

Comes the defendant and within the time allowed by law, moved the Court to set aside the verdict of the jury and the judgment rendered herein, and grant it a new trial, and assigns there as its grounds in support of said motion:

1. The verdict is contrary to law.
2. The verdict is opposed to the overwhelming weight of the evidence, and is the result of passion and prejudice on the part of the jury against the defendant.
3. The verdict is grossly excessive and is the result of passion and prejudice on the part of the jury against the defendant.
4. Error of the trial court in admitting certain incompetent and irrelevant testimony offered by plaintiff; to the introduction of which testimony the defendant at the time and in each instance objected and excepted.
5. Error of the court in excluding certain competent and irrelevant testimony offered by defendant; to which action of the court the defendant at the time and in each instance excepted.
6. Error of the court in overruling defendant's motion to instruct the jury peremptorily to find for it, made at the close of plaintiff's testimony; to which action of the court the defendant at the time excepted.

53 7. Error of the court in overruling defendant's motion to instruct the jury peremptorily to find for it, made at the close of all the evidence; to which action of the court the defendant at the time excepted.

8. Error of the court in giving to the jury instruction # 1, to which action of the court defendant at the time objected and excepted.
9. Error of the court in refusing to give to the jury instruction marked "G" and "H"; to which action of the court in refusing to give each of said instructions, the defendant at the time and in each instance objected and excepted.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Defendant.

At a court held as aforesaid the 2nd day of January, 1914.

The court having considered of defendant's motion and grounds for a new trial herein, and being sufficiently advised, overrules same, to which defendant excepts and prays an appeal to the Court of Appeals, which is granted and time is given it up to and including the 10th day of the next term to prepare and file their Bill of Exceptions herein.

At a court held as aforesaid the 6th day of January, 1914.

This day came the defendant within the time allowed and produced and tendered its Bill of Exceptions herein and same are ordered to *allow* over for examination.

At a court held as aforesaid the 10th day of January, 1914.

The Bill of Exceptions tendered herein by the defendant on a previous day of the persent term having been examined and found to be correct, it is now ordered that same be signed and approved and made a part of the record herein without being spread on the
54 Order Book; all of which is accordingly done.

Mason Circuit Court.

JOHN J. DE ATLEY, Plaintiff,
vs.
C. & O. RAILWAY COMPANY, Defendants.

Bill of Exceptions.

Be it remembered that at the September, 1913 Term of the Mason Circuit Court the above styled cause came up to be heard and plaintiff, to support the issues on his part, introduced the following witnesses:

The witness, JOHN J. DE ATLEY, being of lawful age and having been first duly sworn, testified in his own behalf as follows:

Direct examination:

Q. 1. Your name is John J. De Atley?
A. Yes, sir.
Q. 2. Did you, or not, in the month of December, 1910, enter the employment of the C. & O. Railway Company?
A. Yes sir, I did so.
Q. 3. In what capacity?
A. Brakeman.
Q. 4. How old were you then?
A. I was 19 years old.
Q. 5. Had you ever acted as brakeman on any train before?
A. No sir, I hadn't.
Q. 6. Had you had experience of any kind as brakeman in connection with the railway service?
A. No sir.
55 Q. 7. After you entered into the employment of defendant as brakeman, did you receive an injury?
A. Yes sir, I did.
Q. 8. How long afterwards?
A. About three weeks, or maybe a little over, close to a month.
Q. 9. What train were you engaged in helping to operate when this accident happened?

A. First 95, Manifest.

Q. 10. Where did that *that* train come from?

A. From Russell.

Q. 11. What was done to it, if anything, at Russell before it started?

A. The train was made up at Russell.

Q. 12. Made up of what?

A. Made of perishable cars.

Q. 13. Where did these cars come from?

A. I cannot say positively, but I suppose from Virginia and West Virginia.

Attorney for Defendant: That is not denied.

Q. 14. Where was this train bound for?

A. Covington, Kentucky.

Q. 15. Were any of those cars due to go to Cincinnati?

A. Yes sir, I think they would be.

Q. 16. From the time you entered the employment of the Company, December 10 to the time of your injury, did you receive any instructions from the defendant as to your duties in the operation of the train?

A. No sir, I did not.

Q. 17. Tell the jury whether or not you ever made a demand on the defendant or any of its agents, for a Book of Rules and
56 for information as to how trains on this road were and should be conducted?

A. Yes sir, I asked for the rule book and they said they didn't have any at the time I asked for it.

Q. 18. Do you remember now whom you asked to furnish you with that book?

A. Mr. Funk's stenographer, I believe.

Q. 19. Was he or she the party to distribute the Book of Rules?

A. Yes sir, she was the only one in the office at the time I went in and I suppose she was.

Q. 20. Was his office the place where the books were to be obtained?

A. Yes, sir, I thought that was where they kept them, but I don't know.

Q. 21. Tell the jury what the custom and practice was, if any, during the time you served as brakeman with reference to getting orders for the train or information as to the time at which it should travel?

Defendant objects to the question; the court overrules the objection, to which defendant excepts.

A. Well, I would have to go down in lots of instances and go around up to get orders, go in front of those switches.

Q. 22. Who would give you those orders, what was the custom and practice about that?

A. The engineer.

Q. 23. Where would you go for the orders or information at such times?

A. I would go to the tower.

Q. 24. Tell what the custom and practice of the engineers on the train you ran on, during your term of service was as to setting the trains in motion and moving the trains after you had started for orders or time.

57 A. Well, they would stop the train and I would get off and go up to the front and get an order and catch the train as it came moving by.

Q. 25. Was the custom then after you left for orders to start the train and have you to get on the moving train?

A. Yes sir.

Q. 26. Did that obtain as to orders, all the way through?

A. Yes sir.

Q. 27. Do you remember when you received this injury, the date?

A. Yes sir, it was January 22, 1911.

Q. 28. Who was engineer on this Manifest train?

A. Mr. Bert Kavanaugh, I believe is his name.

Q. 29. When you got to Springdale on this train going west, did he give you any instructions or orders and, if so, what?

A. Yes sir, he told me to call the operator and see if I could get the time on No. 1 or an order, and I called the operator but didn't understand what he said and hung up.

Q. 30. Do you mean a telegraph or telephone operator?

A. Telephone.

Q. 31. Did you or not, report to Mr. Kavanaugh, the engineer, that you could not get any information?

A. Yes sir, I told him I could not.

Q. 32. What, if anything, did he then say to you?

A. He didn't say anything until we got down near the coal docks.

Q. 33. After you left Springdale, what part of the train did you get on or in?

A. The engine.

Q. 34. Were you sitting in the engine with Mr. Kavanaugh?

A. Yes sir.

58 Q. 35. When you got to the coal docks what, if anything, did he tell you to do?

A. To see if I could get the time on No. 1, which was a passenger train, to see how much time he had on it.

Q. 36. Where were you directed to get this time?

A. The tower, I suppose.

Q. 37. How far away was the tower?

A. I don't know the distance and cannot say.

Q. 38. Was the tower in the rear or front of your train?

A. The front.

Q. 39. Did you then start to the tower to get the information?

A. Yes sir, I went to the tower and asked the operator if he had an order and I asked about the time on No. 1.

Q. 40. You say No. 1 is a passenger train?

A. Yes sir, a passenger train, I think it is.

Q. 41. What did he say to you?

A. He said to go on down to Maysville and back over; I believe that is what he said.

Q. 42. When you started ahead to the tower house to obtain this information for the engineer did you delay or stop on the way?

A. No sir.

Q. 43. Did you go direct to the tower?

A. Yes sir.

Q. 44. When you got there, did you stop any longer than to receive the information?

A. No, sir, I was up there just long enough to ask for the order and then back down.

Q. 45. Well, when you came down on the platform was your train then in motion?

A. Yes sir, it was near the tower.

59 Q. 46. Tell the jury what kind of a morning or day it was.

A. It had been snowing and sleeting for two or three days and was still snowing; it had been snowing that night and the next morning it was sleeting and a very cold slick morning.

Q. 47. As the train approached you, did you or not, think you could get aboard safely?

A. Yes sir, I did.

Q. 48. Did you, or not, realize at what rate of speed it was running?

A. No sir, I thought it was running slow enough to board the train all right.

Q. 49. What portion of the train did you undertake or attempt to board?

A. The engine.

Q. 50. Tell the jury in your own way how you proceeded to do that and what followed?

A. What was the question?

Q. 51. I asked you how you proceeded to get aboard this train, what you did in order to do so, and then what happened?

A. I went down on the platform as the engine pulled up and I got the grab iron and put one foot on the step,—I think one foot hit the step and then slipped off and the speed of the train and my weight, I suppose, threw me loose.

Q. 52. When you were thrown loose, what happened to you?

A. I think the coal tender went over my limb.

Q. 53. Did they then stop the train?

A. Yes sir, they stopped it when it got, I guess, half way by, or maybe further.

Q. 54. What then did they do with you?

A. There was another crew at the depot at the time and they cut the caboose loose and brought me to the depot.

Q. 55. And where were you taken from that place?

A. To the Wilson Hospital here in Maysville.

60 Q. 56. What was done, if anything, at the Wilson Hospital?

A. They amputated my limb.

Q. 57. About how close to the knee joint?

A. Eight inches below the knee.

Q. 58. What was your state of health before this accident?

A. I had good health.

Q. 59. What were you earning before that?

A. I suppose, I would average $90.00 a month anyway.

Q. 60. What have you been able to earn since then?

A. I haven't earned but very little since then?

Q. 61. Have you been able to earn anything since then?

A. No sir, I haven't. I haven't been able to do any labor or work.

Q. 62. Did the injury you received there, cause you any pain or suffering?

A. Yes sir, it did.

Q. 63. Much or little?

A. Very much.

Q. 64. Had you ever had any experience in the way of clerical work before this time?

A. No sir, I hadn't.

Q. 65. Where are you living now?

A. I am living in Nicholas County, near Carlisle.

Q. 66. With whom?

A. My father.

Q. 67. Is he living in town or on the farm?

A. On the farm, about three miles from town, I suppose.

Q. 68. You say you are not able to do any work on the farm?

A. Yes sir, and there is very little I can do.

Q. 70. I believe you said you were 19 when the injury happened.

61 A. Yes sir.

Q. 71. What is your age now?

A. 22 in September.

Q. 72. If the engineer, Mr. Kavanaugh, had stopped the train in front of the tower house for you, could you not have boarded it in safety?

Defendant objects to the question, the court sustained the objection, to which plaintiff excepts.

A. Yes sir, I think I could.

Defendant objects to answer, the court sustains the exception to which plaintiff excepts.

Q. 73. How many times, as you now recollect, during your service, had you been sent forward by the various engineers to get time or orders and been required to get aboard moving trains and go on with them?

A. A great many times, several.

By the Court:

Q. 74. What is the nature of that platform you were standing on, is it elevated or right on the ground?

A. I don't know exactly, I forget about that.

Attorney for Plaintiff:

Q. 75. How long had you been down from the tower on this platform before the train passed you?

A. Not very many seconds.

Q. 76. Were you close enough when you got down from the tower upon this platform to be seen by the engineer?

A. No, I don't believe I could have been seen by the engineer; he was on the opposite side.

Defendant objects to the foregoing question and answer; the court overrules the objection, to which defendant excepts.

62 Q. 77. Was there any fireman in the engine with the engineer at the time?

A. Yes sir.

Q. 78. Which side was he on?

A. The side next to where I was standing in front of the tower.

Q. 79. Could he have seen you?

A. I saw him stick his head out of the window before he got down to me and I suppose he could.

Cross-examination:

Q. 1. You had worked for the C. & O. Railway Company before your last employment, had you not?

A. Yes sir, I had.

Q. 2. How long had you worked?

A. Something like three months, I believe.

Q. 3. Where did you work?

A. In the yards in Covington.

Q. 4. The railroads yards down there?

A. Yes sir.

Q. 5. What time was that?

A. That was in 1909, I believe.

Q. 6. What was your position there?

A. I was a laborer.

Q. 7. What was the character of the labor, what work did you do?

A. We worked down in the yards carrying timber, etc. for the repair men.

Q. 8. You were connected with the repair department at that time?

A. Yes sir.

Q. 9. When did you decide to apply for a position as brakeman on a train?

63 A. About a month, or maybe two, before I got the position.

Q. 10. Before you got the position?

A. Yes sir.

Q. 11. What did you do in order to get the position?

A. I went down and asked Mr. Funk, I believe that is his name, if he needed any brakeman.

Q. 12. Well, what did you do——

Defendant objects to the question, the court overrules the objection, to which defendant excepts.

Q. What did you do in order to qualify yourself for a brakeman?
A. He gave me an application and I filled it out and returned it to him.
Q. 13. Did you do anything else?
A. I made a couple of trips over the road.
Q. 14. You went over the road where from, where to?
A. From Covington to Russell.
Q. 15. Who were the conductors you were with?
A. One was a fellow named Wheeler, I believe, and the other was White.
Q. 16. Wasn't it Clark.
A. Maybe it was Clark.
Q. 17. Mr. Clark and Mr. Wheeler?
A. Yes sir, I think so.
Q. 18. You learned the road and went over the road those two trips in order to learn it, didn't you?
A. Yes sir.
Q. 19. After you had learned the road and gotten endorsements from these two conductors, then you applied for the position as brakeman?
A. Yes sir.
64 Q. 20. And qualified yourself to take that position, did you not?
A. Yes sir, I took the position.
Q. 21. How long had you ridden as brakeman over the road?
A. Three weeks, I believe.
Q. 22. Between Covington and Russell?
A. Yes sir.
Q. 23. What did I understand you to say was the custom of the road in its operation, with reference to orders?
A. You had to go down in front sometimes to catch orders and at other times you could catch them on the engine.
Q. 24. The orders were given to the men on the engine, that is when they are going past the tower without stopping?
A. When they get them from the operator it is.
Q. 25. That is always the case, isn't it?
A. Yes sir, I think so.
Q. 26. For the operator to go down and hand the order to the man on the engine?
A. No sir, not all the time.
Q. 27. That is the custom though, isn't it?
A. It is the custom where you are going on through?
Q. 28. This morning was this train going on through?
A. I don't know whether it was or not.
Q. 29. Hadn't you seen the white blocks?
A. I guess I could have seen the blocks.
Q. 30. Couldn't you have seen them if you had looked?
A. Yes sir, I could.
Q. 31. Did you look to see whether there were any blocks ahead of this train directing it to stop at that tower?
65 A. I don't know as I did.
Q. 32. Don't you remember that the blocks were white for the train to go on through?

A. I don't remember at all about the blocks.

Q. 33. You don't remember then having looked at the blocks?

A. No sir, I don't.

Q. 34. As I understand, you got off at Springdale?

A. Yes sir.

Q. 35. Why did you get off there?

A. To call up the operator.

Q. 36. Did the train switch any at Springdale; did you throw the switch there?

A. I disremember whether I did or not.

Q. 37. Think about it, didn't you?

A. I don't remember.

Q. 38. Didn't you go down ahead of the engine when it stopped at Springdale and throw the switch so the engine and train you were on could pass through it?

A. I don't remember that at all.

Q. 39. You won't say that it didn't happen?

A. I won't say that it didn't happen.

Q. 40. Didn't Mr. Kavanaugh ask you at Springdale while you were down there to call up the operator and see whether there was any time on No. 1?

A. Yes sir, he told me to call the operator and get time on No. 1.

Q. 41. There is a telephone down there by the switch, isn't there?

A. Yes sir, it's along there somewhere.

Q. 42. Do you know where that switch is this side of the depot at Springdale?

A. I think I know about where it is.

66 Q. 43. Isn't this telephone down about that switch?

A. Yes, sir, it is very close to where they stop at Springdale.

Q. 44. Didn't Mr. Kavanaugh, the engineer in charge of the engine that morning, didn't he ask you while you were down there throwing the switch to call the operator and find out if there was any time on No. 1?

A. Yes, sir, he told me to call the operator and get time on No. 1.

Q. 45. Wasn't the purpose you went down there for, in the first place, to throw the switch and the telephone was close to it and Mr. Kavanaugh asked you while you were down there throwing the switch to call up the operator?

A. Yes, sir, to call up the operator.

Q. 46. You still say you don't remember whether you threw the switch there?

A. I cannot say.

Q. 47. As head brakeman for the engine on the run it was your duty to throw it and the duty of the rear brakeman, after the train had passed through to close it, isn't that so?

A. Yes, sir, I know that.

Q. 48. And you did call the operator?

A. Yes, sir.

Q. 49. And you didn't understand what he said?

A. Yes, sir, and I told Mr. Kavanaugh that I didn't.

Q. 50. And you got on the engine and came down to the coal docks?

A. Yes, sir.

Q. 51. What did it stop there for?

A. To take coal.

Q. 52. What is your duty as head brakeman when the train stops to take coal?

67 A. Well, there are different things to be done, I suppose.

Q. 53. What are some of those different things you "suppose" about?

A. Well, we generally stop and sometimes we look over the train.

Q. 54. That was your duty as head brakeman, to look over the train and down next the engine to see whether or not there was a hot box?

A. I did it when the conductor gave me orders to do so.

Q. 55. Didn't you look over the train unless the conductor gave you orders?

A. No, sir.

Q. 56. Wasn't it your duty as head brakeman when the train stopped to look over the train?

A. I don't know much about the duty.

Q. 57. Didn't you know that?

A. I cannot say I did.

Q. 58. Can you say you didn't?

A. No, sir, I cannot say.

Q. 59. You won't say either way?

A. I don't know as it's my duty to look over the train unless there was something wrong or something like that.

Q. 60. Didn't you look over the train to see whether or not there was anything wrong and wasn't it your duty to watch the train as head brakeman when it stopped, to see whether or not there were any hot boxes?

A. I did it at times. Generally I did it when we had a heavy train and the conductor told me to look over it.

Q. 61. You had a heavy train this morning, didn't you, a Manifest train?

A. Yes, sir.

68 Q. 62. And a heavy one?

Plaintiff objects to any statement in regard to the train in question being a "heavy one."

Q. 63. That was the reason you looked over the train, when you did look over it, because it was your duty?

A. When I looked over it I looked to see if there was something wrong.

Q. 64. If there was a heavy train, didn't you look over it because it was your duty?

A. I did it because I was told.

Q. 65. Did you always have to be told?

A. I was just learning the road at the time; I didn't know anything about it.

Q. 66. How many times did you have to be told the same thing?
A. About once was all.
Q. 67. And you had looked over heavy trains, hadn't you?
A. Yes, sir.
Q. 68. And you had been told once to look over them and you had looked over them, hadn't you?
A. Yes, sir.
Q. 69. And you say you didn't have to be told but once?
A. That is all.
Q. 70. Then you knew it was your duty in connection with the heavy train to look over it when it stopped?
A. Yes, sir, I knew it was my duty.
Q. 71. And you knew you had a heavy train that morning?
A. Yes, sir.
Q. 72. What did the engineer say to you coming down to the coal docks?
A. That we would have to get time on No. 1 and to get down and get the time on No. 1.
69 Q. 73. When was it he said, "We will have to get time on No. 1?
A. It was before we got to the coal docks he said that. He said when we got to the coal docks to get time on No. 1.
Q. 74. Where were you then?
A. In the engine.
Q. 75. Do you know how far the tower was?
A. No, sir, I don't know the exact distance.
Q. 76. Could you see it?
A. Yes, sir.
Q. 77. It was a quarter of a mile ahead of you, wasn't it?
A. I don't think it is.
Q. 78. It was a pretty good distance from the coal docks down to the tower?
A. Yes, sir, a right smart little step.
Q. 79. And you got off the engine and went down to the tower?
A. Yes, sir.
Q. 80. And walked up in the tower and asked the operator about the time?
A. Yes, sir, I asked him first if he had an order and then I asked for the time on No. 1 and he said we had 15 minutes, or something like that, I disremember the exact time he gave me.
Q. 81. And you came down then out of the tower?
A. Yes, sir.
Q. 82. And went out to the end of the platform?
A. Down on the platform, yes, sir, close to the train.
Q. 83. And the train was getting close to you at that time?
A. Yes, sir.
Q. 84. How fast was it running?
A. I could not judge of the speed, but it didn't look to be running very fast.
70 Q. 85. You didn't pay much attention to speed did you?
A. I could not judge of it.

Q. 86. Did you pay much attention to it?
A. I could not.
Q. 87. State whether or not you did pay much attention to it?
(Witness fails to answer this question.)
Q. 88. Was it your habit to get on moving trains without noticing the speed at which they were running?
A. I generally did.
Q. 89. Why didn't you this morning?
A. I thought I did but I misjudged the speed of it, I suppose.
Q. 90. Isn't it a fact that you didn't pay much attention to it?
A. No, it isn't, I was watching the train all the time.
Q. 91. You testified in the case in which your father sued the C. & O. for the loss of your services by reason of this accident, didn't you?
A. Yes, sir.
Q. 92. Didn't you on that trial say you didn't pay much attention to the speed of this train?
A. I don't know as I did.
Q. 93. I- answer to question 38, didn't you say "He told me to go down and get time on No. 1, so I expected him to slow down for me as they had been used to. He came down at a little too much speed and I guess I didn't pay much attention to the speed of the train. I walked out to catch it and missed my footing."
A. Probably I said that.
Q. 94. Isn't that just what you did say at that time?
A. I don't know. I have forgotten what I said at that time.
Q. 95. That was closer to the time of the accident than this and your memory was just as good then as to what you did as it is now, wasn't it?
A. Yes, sir, I guess it was.
71 Q. 96. You say that a great many times you walked ahead of the train to get orders?
A. Yes, sir.
Q. 97. How many times did you do that?
A. I couldn't say.
Q. 98. You hadn't been on the road very long, had you?
A. No, sir, I had made about six trips, I think.
Q. 99. You said it was customary when the train was going on through for the operator to come out and hand the order on the engine, didn't you?
A. He did in some instances, yes, sir.
Q. 100. You say you could see the blocks that morning, if you had looked for them?
A. Yes, sir, I could have seen them.
Q. 101. You could have seen up the track the blocks at the Fair Ground from where you were in the engine?
A. I don't remember looking from the engine.
Q. 102. If you had looked, you could have seen them?
A. Yes, sir, I could have seen them, they were in sight.
Q. 103. Whereabouts did you ever go ahead of a train to get orders and then board it as it passed?

A. I believe I have at Concord and several places.
Q. 104. Where else.
A. I don't remember all the stops there were.
Q. 105. You acquainted yourself with the road, didn't you?
A. No, sir, I didn't know every station yet.
Q. 106. At Concord, you could not have done that, could you?
A. I think I could but I don't know.
72 Q. 107. Isn't that water tank at Concord, right at the depot?
A. I don't remember about that.
Q. 108. Try to think about it as it is.
A. I am trying to do so.
Q. 109. You have told me you got off the engine at Concord and went ahead to get orders, and caught on as the train passed on through, moving?
A. I think so, but I am not positive.
Q. 110. Isn't it a fact that where the train stopped at Concord to take water, the water tank is right at the depot?
A. I don't know whether I remember where Concord is at.
Q. 111. Why did you say to the jury you thought you did so at Concord?
A. Well, I thought I did.
Q. 112. Will you say to the jury now you did that at Concord?
A. No, sir.
Q. 113. Where else on this road did you go ahead of the engine to get orders for the moving of this train and the engine and train passed through and you would board it?
A. I told you once before I don't remember the stations.
Q. 114. You don't remember any where else?
A. No, sir, but I know I did it several times.
Q. 115. A quarter of a mile ahead of the train?
A. I don't know the distance.
Q. 116. You know how much a quarter of a mile is, don't you?
A. I know about, I think.
Q. 117. Did you ever go that far ahead of an engine and a Manifest train to get orders for the engineer?
A. I don't know as I did.
Q. 118. This was given you November 29, 1910, was it not? (Shows paper to witness.) Was it not given to you then, Mr. De Atley?
73 A. Yes sir, I think that is what was given me.

Defendant here offers to read the paper in question to the jury and make same part of the evidence, to which plaintiff objects; the court overrules the objection, to which plaintiff excepts, and the paper is read to the jury as follows:

"C. & O. Railway Company, Covington, Ky.

Nov. 29, 1910.

Through and local freight conductors:

Permit the bearer, John De Atley, to ride with you with a view of qualifying for the position of brakeman and O. K. this when you

think him competent to go out by himself. Good until December 9, 1910.

Yours truly,

G. H. FUNK,
Train Master.

John De Atley worked from 664 to 524 learning the road.

O. K.
J. W. WHEELER.
R. CLARKE."

Q. 119. You got that and took it back and turned it in, didn't you?
A. Yes sir.

And further saith not John De Atley.

At the conclusion of the foregoing evidence plaintiff introduced the Wigglesworth Life Tables, showing that the expectation of life of a man 19 years of age is 34.59 years.

The foregoing was all the evidence introduced by plaintiff.

Defendant then moved the court to give the jury peremptory instructions to find for it, to which plaintiff objects and excepts, and the court having considered said motion overrules same, to which defendant objects and excepts.

Defendant, the C. & O. Railway Company, then introduced in its behalf the following witnesses:

First. The witness, BOYD KAVANAUGH, who being of lawful age and having been first duly sworn, testified as follows:

74 Q. 1. What is your full name?
A. Boyd Kavanaugh.
Q. 2. Where do you live?
A. In Covington, Kentucky.
Q. 3. What is your age?
A. I will be 56 my next birthday, the 28th of December.
Q. 4. What is your occupation?
A. R. R. Engineer.
Q. 5. How long have you been R. R. Engineer?
A. 26 years.
Q. 7. With what roads?
A. Pennsylvania Southern and C. & O.
Q. 8. How long have you been with the C. & O.?
A. About 21 years and 6 months, I think.
Q. 9. Were you the engineer on No. 95 coming west the morning of January 22, 1911?
A. Yes sir.
Q. 10. Was the plaintiff, young Mr. De Atley, the head brakeman on that train that morning?

A. Yes sir.

Q. 11. Who was your fireman?

A. Mr. Rice.

Q. 12. And your conductor?

A. Mr. Martin.

Q. 13. And your rear brakeman?

A. I think his name was Weeks. I think he was an extra man. I am not acquainted with him.

Q. 14. What was your train known as?

A. No. 95 Manifest train.

75 Q. 15. What is a Manifest train?

A. It is supposed to be composed of groceries, household goods and perishable goods, merchandise, etc.

Q. 16. It is a through freight, is it not?

A. Yes sir.

Q. 17. Do you know what size train you had that morning?

A. I think we had about 60 cars but I could not say whether or not they were all loads, although I think the majority of them were.

Q. 18. State whether or not you stopped at Springdale that morning?

A. Yes sir.

Q. 19. Why did you stop at Springdale?

A. We took the siding for No. 98, a superior train, another Manifest train going east. Ninety-eight had superior rights over the west bound and we had to take sidings for 98.

Q. 20. At that time, January, 1911, was the double track in existence clear through?

A. No, sir. There at what is termed the Fair Grounds was the double track in those days.

Q. 21. That double track coming through to Maysville started at the tower at the Fair Grounds?

A. Yes sir.

Q. 22. This siding you went on at Springdale, was to enable 98 to occupy the main line going east?

A. Yes sir, it was a passing track.

Q. 23. How did you come out of the siding and on to the main line at Springdale?

A. When the train got by and we had a right to go, the head brakeman goes and opens the switch and we proceed then.

76 Q. 24. On that morning, after 98 went east, did you have a right to come out on the siding west?

A. Yes sir.

Q. 25. Whose duty was it to go ahead and throw the switch so you could get on the main line?

A. It was the duty of the head brakeman.

Q. 26. On this morning, who was the head brakeman?

A. The young man De Atley.

Q. 27. The plaintiff in this case?

A. Yes sir.

Q. 28. Where was the switch at that time with reference to the depot at Springdale?

A. Well, the biggest part of the switch, you might say, almost all of it, is west of Springdale station.

Q. 29. Between your engine and the switch point where you left the siding, coming on to the main line, was there any means of communication with the office at Springdale?

A. Yes sir, there was a telephone there.

Q. 30. Describe that telephone.

A. The telephone is, I would judge, probably two car lengths or three east of the switch, so that trains are in the clear of the main line.

Q. 31. Would a head brakeman leaving the train to go and throw that switch, pass that telephone box?

A. Yes sir, he had to go right by it in order to get to the switch.

Q. 32. Do you remember asking young De Atley that morning, to use the telephone and ask the operator about No. 1?

77 A. I think I did, but I would not be positive. I didn't really need the time, I had my own time on the time-card, but I think I told him to call up the operator and see how No. 1 was running; just for information before he went to the switch.

Q. 33. Did you move out of the siding on the main line?

A. Yes sir, after he threw the switch, I proceeded on out of the siding and we closed the switch and he gave me the signal to go and I went on to the Fair Grounds.

Q. 24. And the rear brakeman closed the switch?

A. Yes sir.

Q. 25. And your train moved out of the siding and on to the main line and the head brakeman climbed aboard the train?

A. Yes sir.

Q. 26. Did you go on to the coal docks?

A. Yes sir.

Q. 27. Did you stop there?

A. Yes sir.

Q. 28. Why did you stop there?

A. To take coal.

Q. 29. How far, in your judgment, are the coal docks, or were the coal docks that were there at that time, from the tower?

A. About a quarter of a mile, as near as I can come at it.

Q. 30. State whether or not after you went out of the siding and on to the main line going down to the coal docks, whether you directed Mr. De Atley, the head brakeman on your train, to go to the tower at the Fair Grounds to get orders or find out about No. 1.

A. No sir, I did not.

Q. 31. At any point on that main line, after you left Springdale, up to the time you spoke of, did you give him any such direction?

A. No sir, I did not.

78 Q. 32. Did you really know he had gone down there?

A. No, sir, I did not; I supposed he was back looking over his train but I didn't see him anywhere.

Q. 33. When you stopped at the coal docks, what did you do?

A. We took coal and when we got ready to go I called in my flag by five whistles from the east.

Q. 34. What occurred then?

A. I waited a little bit and got a signal from some one coming over the train, probably 15 cars back of the engine, and supposed it was this man De Atley, the brakeman. I supposed that it was him, but he was a stranger to me.

Q. 35. What was the signal you got?

A. I got a signal to go.

Q. 36. When you got that signal, what did you do?

A. I started it with a whistle and started pulling out.

Q. 37. During the time you stopped at the coal docks there, were you or not still on the main line?

A. Yes sir.

Q. 38. Down to this tower, at the east end of the Fair Grounds, state whether or not that is the point at which the double track started in those days and continued down through the city of Maysville as a double track?

A. Yes sir.

Q. 39. The east bound double track was occupied that morning?

A. Yes sir, by an engine and caboose.

Q. 40. What blocks were out for the information of the crew on the train?

A. There were no blocks showing an indication of orders. There was also another block, what we call a "block train," and they were both clear.

79 Q. 41. What can you do when they are both clear?

A. Proceed.

Q. 42. Go right straight ahead.

A. Yes sir.

Q. 43. After you started ahead, just tell the jury what you did and what your train did?

A. I went ahead and left the coal docks and I saw a man standing on the platform and I supposed it was either the operator or one of the work-train men who was standing in the clear and was going to hand me a message. There was no block out to indicate any orders, the fireman was busy and I stepped on his side to reach for the message, or whatever it might be, and just as I went to reach for this order or message, as I supposed, or whatever it might be, this head brakeman made a dive for the engine to get on. He got hold, I think, of the grab iron and, I supposed, he must have slipped. I saw him fall and I ran over to my side and slapped the air on in full emergency to stop.

Q. 44. As I understand, you left the right hand side of the cab as your train was coming west and stepped to the left side of your engine through the gangway, expecting to reach out and get this order?

A. Yes sir.

Q. 45. Do you remember whether or not your fireman got down off the seat?

A. He had been working at his fire and I think he got up on the seat box about that time; I am not positive, but think he did.

Q. 46. Did you stop the train as soon as you could?

A. Yes sir.

80 Q. 47. And do you know what became of the young man after that time?

A. The fireman got down and ran back and he said, "I believe the boy it hurt." So, as soon as I could leave the engine, I shut the injector off and I started back to see if I could do anything toward helping him and some workmen were standing there and they said to get out of the way and they would get him to the doctor quicker than I could. I had 60 cars and they just had an engine and caboose, and they said to get out of the road and they would take care of him so I proceeded to Maysville.

Q. 48. You got on your engine and came on west?

A. Yes sir.

Q. 49. Mr. Kavanaugh, what is a No. 31 Order?

A. Thirty-one is a restrictive order.

Q. 50. What do you mean by that?

A. Well, it gives you rights, the conductor is supposed to sign those orders.

Q. 51. What does a restrictive order mean, explain it to the jury?

A. Say you are going out on an extra, a running order is supposed to be a 31 Order and a 19 order is a helping order.

Q. 52. What does the 31 Order fix; some definite movement of the train?

Plaintiff objects to the question; the court overrules the objection to which plaintiff excepts.

Q. 53. Describe to the jury what 31 Orders are, what instruction they give?

Attorney for Plaintiff:

Q. 54. Are those orders in the Book of Rules?

A. Yes sir.

Attorney for plaintiff continues to object to questions in regard to a 31 Order.

81 By the Court: Can we have the Book of Rules?

Attorney for Defendant: Yes sir.

Q. 55. You know a 31 Order is what you call a restrictive order, did you say?

A. Yes sir.

Attorney for plaintiff moves to exclude from the jury all that has been said by witness in regard to a 31 Order; the court sustains said motion and instructs the jury not to consider what has been said by witness in regard to Order 31, to which defendant excepts.

By the Court: Have you a book there defining Order 31?

Attorney for Defendant: Yes sir.

By the Court: Let counsel for plaintiff see the book in question.

Attorney for plaintiff continues his objection to the introduction of testimony in regard to a 31 Order; the court sustains the objection, to which defendant excepts.

Q. 56. I will ask you again the condition of the signals at the tower when your train stopped at the coal docks?

A. You want to know the position?

Q. 57. Yes sir, the position of the signals.

A. There was a block there, but then there was an order block? a west bound or east bound block, it is to block trains and stop them. Then there is an order block, a short block standing out that way, (Witness indicates by gesture) and that shows there are orders there for you, and then there is a block that stands the same way
82 and if they are both down, it indicates a clear block. Of a night they have a white light, when it indicates clear and a red for stop, and also the other block is red and white; but this happened in daylight.

Q. 58. On this morning, what was the condition of those blocks?

A. They were down, indicating a clear block.

Q. 59. Was there any indication to you that there were orders for the train there at the tower, at the east end of the Fair Grounds, that morning?

A. No sir.

Q. 60. I will ask you if there is any custom amongst the operators of a train, the freight trains on the C. & O. Railroad, in regard to a brakeman ever having to leave the engine and train they are connected with and go ahead to a tower house to get orders and then board the train while it is in motion?

A. It is not compulsory for them to do so. They are supposed, in a stop at a point of any unusual length, to look over their trains and see if there is a hot box or anything wrong with the train. Of course, if they haven't anything else to do, and take it upon themselves to go to the office and get these 19 orders, if it is acceptable to the operator to give them to them; but there is no rule of the company for them to do this.

Q. 61. As a matter of fact, do the brakeman have anything to do with handling the orders?

A. No sir, the engineer and conductor are responsible for those orders.

Q. 62. With reference to the custom of the brakemen, in this service to leave the train and go into an office, or a tower that has an operator in it, how are the towers situated with reference
83 to the train?

A. If it is close and they are knocking around there, they may go into the office, but very few of them will walk very far to get those orders.

Q. 63. Is there any custom among brakemen with reference to leaving an engine and train and walking ahead a quarter of a mile to reach the tower and find out whether there is an order there?

A. No sir.

Q. 65. Have you ever heard of a case of that kind, except in this instance?

A. No, I never had it happen to me before for a brakeman to walk that distance.

Q. 66. As I understand you, the blocks were so set on this occasion they showed there were no orders there for you?
A. No sir.

By the Court: Just what does the witness mean by "no sir"?

Attorney for Defendant:

Q. 67. The condition of the blocks there on that occasion, did it indicate whether or not there were orders; you say the blocks were down, what did that indicate to you?
A. A clear block.
Q. 68. Did that indicate whether there were orders at that tower for you or not?
A. It meant no orders and a clear block.
Q. 69. Who did you think it was that gave you that signal to go ahead with the train, that was on the freight car, 12 or 13 cars back?
84 A. I supposed it was my head brakeman.
Q. 70. That is the plaintiff, Mr. De Atley?
A. Yes sir.
Q. 71. What is the custom in the operation of trains with reference to operators delivering messages from the telegraph offices to those in charge of the train, the engineers?
A. They come down and hand them on when you are passing; with 19 orders, a message to do work, they come down and hand those orders up to us when you don't want to stop.
Q. 72. How fast do you sometimes run when you get those orders?
A. Well, I have run pretty fast, probably 30 miles an hour.
Q. 73. And pick up orders in that way?
A. Yes sir, pick them up right along.
Q. 74. Did you know your head brakeman, De Atley, had gone down to the tower morning?
A. No sir, I did not.
Q. 75. How fast were you going, do you think, when you got to the tower that morning?
A. Probably about 12 miles an hour.
Q. 76. When did you first recognize the fact that the young man on the platform that morning was your head brakeman, De Atley?
A. I didn't recognize him until he went to get on the engine. He was a stranger to me, of course, and I didn't recognize who he was until he made an effort to jump on the engine.
Q. 77. Was this the first trip he had made with you?
A. Yes sir, the first out of Russell he didn't work with me at all.
Q. 78. Did he give you any signal to slow down your train?
85 A. No sir. I saw a man standing there and didn't know who he was until he jumped on the engine.
Q. 79. He could have given you a signal, could he not?
A. Yes sir, he could.

Cross-examination:

Q. 1. Were you acquainted with Mr. Andrew Boyd, operator at the tower?

A. Well, I know him, he is a passing acquaintance.

Q. 2. How long have you known him?

A. I could not say just how long. They change around a good deal; he was at the Fair Grounds quite a while, but I cannot say how long.

Q. 3. About how long?

A. I could not say positively.

Q. 4. Give your best judgment.

A. Probably he may have been there a year, I could not say.

Q. 5. You haven't a distinct recollection about it?

A. No sir.

Q. 6. These things are changed so you don't fix them in your mind?

A. The operators, of course, are changed around considerable and then I very seldom ever go in an office. They hand those orders on, those 19 Orders are handed on, but I never go around the telegraph office very much.

Q. 7. You see the face of the operator when he hands them on, don't you?

A. Yes sir.

Q. 8. And you had seen Mr. Boyd's face and figure often enough to recognize it, hadn't you?

A. Well, I guess I had, I knew who he was.

86 Q. 9. And you knew this wasn't Andrew Boyd standing on the platform?

A. I could not tell who it was. You see I wasn't positive whether he was on duty at that time or not. They have three shifts, eight hour shifts, you see. I didn't know whether it was the operator or one of those work train men. You see there were probably three or four of the other crowd around the depot or this tower and I didn't know whether it was the operator or one of the men who was going to hand me something.

Q. 10. Did you see anything in his hand?

A. No sir.

Q. 11. Did he make any signal to you?

A. Only when he made a move to get on the engine; that is the only move I saw, when he made a dash to get on the engine.

Q. 12. When did you first see him?

A. Probably five or six car lengths.

Q. 13. How much is a car length?

A. It differs, some are 40 and some 50 feet long, they are different lengths.

Q. 14. What was the average length of the cars in your train that day?

A. I could not say, probably 40 or 50 feet, I could not say exactly.

Q. 15. Isn't it the right, privilege and duty of the head brakeman to ride in the engine?

A. Well, when he hasn't anything else to do he rides in the engine to get in out of the weather, but if he has any business to attend to or signals to give, he is supposed to be on top.

87 Q. 16. When your train stopped at the docks, did you direct your head brakeman to do anything?

A. No sir.

Q. 17. How long did you remain at the docks?

A. About ten minutes.

Q. 18. Loading on coal?

A. Yes sir.

Q. 19. Did you tell him how long you were going to remain at the docks?

A. No sir.

Q. 20. What sort of a day was that?

A. Well, it wasn't to say a cold day. It was one of those warm winter days, you might call it, not warm, but moderate weather. I think it snowed a little skift of snow.

Q. 21. Was there any ice or snow on your cars?

A. No, I don't think there was.

Q. 22. Was there any sign of anything of that kind?

A. No sir.

Q. 23. This was what day in January?

A. The 22nd.

Q. 24. Have you anything the matter with your eyesight?

A. No sir.

Q. 25. You are wearing bi-focal lenses, are you not?

A. I have had them about two years but I can see about as well without them; I use them to read.

Q. 26. Can you see at a distance as well from one part as the other of the glasses?

A. I can see good yet; I don't need to use them; that is so far as seeing at long distances is concerned.

Q. 27. Did you have them on that day?

A. No, sir, I didn't have them then, I don't think.

88 Q. 28. Up to that time you hadn't bought any glasses?

A. I think I had glasses to read the newspaper. I can read an order yet without glasses, so far as that is concerned, if it is plainly written; but for safety, I use my glasses.

Q. 29. You wear them now whenever you are on duty, don't you?

A. Well, not always, but to read an order I do and to read the paper I generally use them, but if an order is plainly written I can read it without glasses.

Q. 30. What is your object in having the two lenses?

A. Long and short sight.

Q. 31. Do you have to have them then when you read and also have to have them when you see at a distance?

A. I don't have to have them, no sir.

Q. 32. What do you wear them for if you don't have to have them?

A. Well, I have been wearing them,—of course, I can get along better with them,—and I think it is better to have them.

Q. 33. Do you have them because it looks better to wear them?

Defendant objects to the question; the court sustains the objection, to which plaintiff excepts.

Q. 34. Which of those lenses do you look through when you are looking at long distance, the upper or lower?

A. Both of them, I suppose.

Q. 35. When you are looking at long distance?

A. I suppose so, one for each eye.

Q. 36. Which of the two lenses, the upper portion of the two lenses, do your two eyes look through; I mean do you look through the upper or lower portion of the two lenses when you look at long distance?

A. The lower portion.

Q. 37. What is the upper portion used for?

89 A. Reading.

Q. 38. Then, if you were looking through the upper portion, you could not see at long distance, could you?

A. I believe I could. I never had any trouble in seeing at long distance, even with the naked eye.

Q. 39. Then you don't need glasses at all, do you?

A. I need them to read with, as I told you.

Q. 40. You haven't been reading any today in the court room since you put them on, have you?

A. I was looking through some papers out there and read the newspaper.

Q. 41. You haven't been reading with them since you have been sitting here during the trial of this case?

A. No sir. I can take them off if you want me to.

Q. 42. I don't want you to take them off, it don't make any difference to me whether you wear them or not?

A. I supposed you did.

Q. 43. If you have answered this question, I don't recollect: what was the distance from the coal docks to the tower; I believe that question was asked you and you answered that it was a quarter of a mile.

A. Yes sir.

Q. 44. And by the time you had gotten from the coal docks to the tower you think you were going at the rate of about 12 miles an hour?

A. Yes sir.

Q. 45. In what length of time did you stop the train after the young man was hurt?

A. After he was hurt until I stopped it?

90 Q. 26. Yes sir.

A. I could not tell but I don't think it could have been more than half a minute.

Q. 47. How far did it run after he was struck?

A. I judge about six or eight car lengths.

Q. 48. In receiving orders as you go up and down the road, does the fireman ever take them from the telegraph operator?

A. Yes sir.

By the Court: The information you wanted at Springdale as to the movements of No. 1 which you requested the plaintiff, De Atley, to get for you over the phone, did you still want that information at the coal docks?

A. No sir, I didn't want any information in particular at Springdale, only I cannot say positive, but I think I told this man he might call up and ask how No. 1 was, just for my information. I was running on a time-card and didn't really need the other, but just for information I told him he might call up at Springdale and he said the phone wasn't working or he could not make the operator understand, or something of that kind and I went on my card rights, which I had the right to do.

Redirect examination:

Q. 1. That is your schedule time, you mean by your "card rights"?

A. Yes sir.

Q. 2. Bearing out the schedule time of No. 1 reaching Maysville, you say you had time to get into Maysville without delaying No. 1?

91 A. Yes sir, without delaying No. 1.

Q. 3. I didn't hear your answer to this question; how far were you from this young man when you saw him on the platform?

A. I think probably it must have been about six car lengths, but I cannot say positively. I saw some one standing there but I didn't know who it was.

Q. 4. After you saw him standing there, is that the time you left and went through the gangway to go over and get the orders?

A. Yes sir, I stepped over there and by the time I got over there to the fireman's side of the gangway, when I began to get close to him, he made a dive to get on the engine and I recognized him as being my head brakeman.

Q. 5. Do you remember whether or not you said anything to the fireman about catching the order?

A. I believe I did tell the fireman he might catch it and then I saw he was busy and the fellow didn't make any motion and I wasn't positive as to whether he had an order, or what he was standing there for, and I thought maybe it might be the operator or some of the men handing me a message or order. Very often they hand us messages, so I looked over to see if he had anything.

Q. 6. How long have you worn glasses, did you say?

A. I have had these about two years, I think.

By the Court:

Q. 7. On which side of the cab were you?

A. I was on the right side and crossed over to the other side.

92 Q. 8. About how close could you get to the young man on the platform and have sight of him; you were on the opposite side of the cab, as I understand, from him?

A. When I first saw him?

Q. 9. How near could you draw down to him and have sight of him; in other words, when would you lose sight of him in your engine?

A. If I still staid on my side, after the engine got too close to him, I could not see him except when I passed him.

Q. 10. How near could you get down to him on your side and have a view of him?

A. Probably four or five car lengths.

Q. 11. Did you lose sight of him after that?

A. No sir, I don't know that I lost sight of him in *in* particular.

Attorney for Defendant:

Q. 12. Sitting up on the right hand side of the cab, what part of the engine is in front of you?

A. The fire box and boiler.

Q. 13. A person on the opposite side, on the left hand side, as you approach him what would come between you and that person to interfere with your view as you got closer to him?

A. Probably in the length of the engine the boiler might possibly shut the view off for a short period of time.

Q. 14. That is a solid object which is just in front of you?

A. Yes sir.

Q. 15. And it is by reason of the fact the other person is on the other side of the track?

A. Yes sir.

93 Q. 16. How long would your view of this man on the other side of the track be lost by reason of that interference of the boiler?

A. That would be owing to the rate of speed at which we were running.

Q. 17. I mean the distance?

A. Probably a car length, or two, maybe.

And further saith not Boyd Kavanaugh.

Also the witness, A. G. STEWART, who being of lawful age and having been first duly sworn, testified as follows:

Q. 1. Do you know where the tower was at the east end of the Fair Grounds?

A. Yes sir.

Q. 2. And the old coal docks that were in there two or three years ago?

A. Yes sir.

Q. 3. Did you measure the distance from that tower to the point of those coal docks?

A. I counted the rails.

Q. 4. How many were there?

A. 46.

Q. 5. Do you know the length of a rail?

A. Thirty feet. We stepped a rail and it is about 30 feet.

Q. 6. That would make 1380 feet; 46 rails and 30 feet to a rail?

A. Yes sir, 460 yards.

And further saith not A. G. Stewart.

94 Also the witness, JOHN RICE, who being of lawful age and having been first duly sworn, testified as follows:

Q. 1. How old are you, Mr. Rice?

A. 24 past.

Q. 2. Whereabouts do you live?

A. In Covington, Ky.

Q. 3. What is your occupation?

A. Fireman.

Q. 4. For what road?

A. The C. & O.

Q. 5. About how long have you been a fireman on the C. & O.?

A. About three years and five or six months, altogether.

Q. 6. Were you a member of the crew on train #95 on the morning of January 22, 1911?

A. The morning young Mr. De Atley got hurt, yes sir.

Q. 7. Were you firing the engine that morning?

A. Yes sir.

Q. 8. Do you remember whether or not you stopped at Springdale?

A. Yes sir.

Q. 9. Why was that stop made?

A. There was a meeting order there, first No. 98.

Q. 10. In which direction was #98 going?

A. East.

Q. 11. In order to allow #98 to go through, what did train #95 do?

A. Took the siding at Springdale.

Q. 12. Who did the switching to let #95 come out on the main line?

A. The head brakeman, De Atley.

Q. 13. The plaintiff in this case?

A. Yes sir.

95 Q. 14. Do you remember when he went down to throw that switch.

A. Yes sir.

Q. 15. Do you remember whether the engineer said anything to him about calling up the operator——

Plaintiff objects to the question; the court overrules the objection, to which plaintiff excepts.

A. Yes sir.

Q. 16. Where would the head brakeman go to call the operator?

A. Down the side track there is a phone by the passing track that goes right to the switch.

Q. 17. Do you remember what the engineer said to him?

A. Yes sir, he told him to call the operator at Springdale and ask if he had anything on No. 1.

Q. 18. Did the brakeman throw the switch and let your train out?

A. Yes sir, he threw the switch and came back and said he could not get him and Mr. Kavanaugh said, "Never mind; we have time to go anyway."

Q. 19. What place did the head brakeman occupy on the train after he got on to go to the coal docks?

A. He sat on a seat in front of me on the left side of the engine.

Q. 20. Is there not a seat on the fireman's side of the engine, the left hand side, to be occupied by the head brakeman when the train is in motion?

A. Yes sir, there is one put there for him.

Q. 21. How far did your train run before it stopped after it left Springdale?

A. To the coal docks.

Q. 22. What did you stop at the coal docks for?

A. Coal.

Q. 23. Where were those coal docks situated with reference to the tower and telegraph office of the C. & O. at the east end of the Fair Grounds?

96 A. I guess a quarter of a mile east of the tower.

Q. 24. From the time you left Springdale until you got down to the coal docks and while you were there, did you, or not, hear the engineer direct Mr. De Atley to go down to the tower and get an order?

A. No sir, I never heard him say a word to De Atley after we left Springdale.

Q. 25. Did you know what became of Mr. De Atley?

A. No sir, I was up on the tank.

Q. 26. What did you go up there for?

A. To level off the coal.

Q. 27. It was after the coal had dropped into the tank?

A. Yes sir. When we had the old coal docks we had to shove it under in order to get a full supply of coal.

Q. 28. After your train stopped at the coal docks; was any motion made after that time?

A. Not until he called in the flag and started away.

Q. 29. Was any signal given to the engineer to start the train?

A. Yes sir, the "go-ahead" signal was received from about ten cars back.

Q. 30. After the train had started, in what direction did it go?

A. West.

Q. 31. That is down through Maysville?

A. Yes sir.

Q. 32. Did it pass the tower coming west?

A. It went right by the tower.

Q. 33. What did you do after the train started?

A. I had to fire the engine and keep the steam on. It needed working up a little and I had to put my hook in it after we started.

97 Q. 34. Do you remember whether any statement was made to you by the engineer on the train after you started?

A. No sir; as we left the docks I had my hook in the fire box——

Plaintiff objects to the foregoing question and answer; the court overrules the objection, to which plaintiff excepts.

Q. 35. What statement did he make?

A. He told me to catch that order and I was hooking the fire at the time and before I could lay the hook up he was on the left side reaching down to get it and I was going to lean out the window and catch the order.

Q. 36. When you got the fire hooked out, what did you do?

A. I laid the hook on the tank so I could try to reach out and get the order and just as I got to the window I saw De Atley try to get on.

Q. 37. And he failed to make connection and was thrown under the engine?

A. Yes sir, under the front wheel of the truck on the left side and it caught his leg.

Cross-examination:

Q. 1. How long did you stop at the coal docks?

A. I don't know exactly, but just long enough to get coal.

Q. 2. What were you doing while you were stopping at the coal docks?

A. I was up on the tank leveling off the coal.

Q. 3. The whole time you were there?

A. Yes sir.

Q. 4. When the train started what were you doing?

A. Attending to my fire.

Q. 5. How long did you continue to attend to your fire?

A. I had to stay right with the engine. I put in one fire and hooked her and then I put in some more. I don't know just how long it was between fires, but it was just a space of two or three minutes. We had a heavy train that day.

98 Q. 6. Had you finished your fires before you got to the tower?

A. No sir, I had the hook in the fire box.

Q. 7. You say you saw De Atley at Springdale?

A. Yes sir.

Q. 8. When was the last time you saw him?

A. At Springdale he got up on the engine as we came out of the passing track and we received a high ball and he stayed there until we got to the Fair Grounds.

Q. 9. Then what did he do?

A. I got up on the tank and I never paid any more attention to him after I got up there. I don't think I saw him get off the engine.

Q. 10. He was sitting there in the engine when you last saw him?

A. He was in the cab when I last saw him, inside the cab.

Q. 11. The engineer was inside the cab also?

A. No sir, he was on the ground oiling the engine.

Q. 12. How long did he continue on the ground oiling the engine?

A. I could not say how long; just as quick as he could oil around and get back up there.

Q. 13. How long did it probably take him?

A. Five minutes, or more, I guess.

Q. 14. And after he got up in the cab after oiling the engine, how long did he remain there before he started the train?

A. I don't know exacty. I hollored to ask him if I had time to get a big, full tank of coal and he said "yes", and he got up and helped me level it off.

Q. 15. He got up and helped you level it off, you say?

A. Yes sir.

Q. 16. After he quit leveling off the coal, what did he do?

99 A. He came down and called in the flag and received the signal to go ahead and started.

Q. 16. From whom did he get that signal?

A. From a man about ten cars back on the train.

Q. 17. Who was the man?

A. He thought it was the head brakeman.

Q. 18. Who did you think it was?

A. I didn't see the signal given.

Q. 19. You didn't know then of a signal having been given?

A. No sir, I was putting in the fire.

Q. 20. How did you know he thought that?

A. I only know what he said.

Q. 21. When did he say it?

A. When we started away; they gave "high ball".

Q. 22. Did you see any "high ball" given?

A. No sir.

Q. 23. And you don't know of your own personal knowledge whether any was given at all?

A. Yes sir, when they say "high ball", the engineer calls it to the fireman.

Q. 24. When you were at Springdale, were you expecting No. 1?

A. No; we were running ahead of her and were pretty close on her time, 30 or 40 minutes ahead of her, I guess.

Q. 25. No. 1 came in from the east, did she?

A. Yes sir.

Q. 26. What sort of a train is No. 1?

A. A through passenger train coming from the east.

Q. 27. The F. F. V. coming from New York and Washington?

A. She comes from the east; I don't know where.

100 Q. 28. And you were running on her time?

A. No sir, we were 30 minutes or so ahead of her, I guess.

Q. 29. Then the signals you saw in front had reference to trains west of you and no reference to trains going east?

A. Yes sir.

Q. 30. You could not tell from those signals anything about the conditions of trains east of you?

A. No sir.

Q. 31. About how fast was this train going when you reached the tower?

A. As near as I could judge between 10 and 12 miles an hour; as near as I could judge of the speed.

Q. 32. You say you heard the engineer at Springdale tell the head brakeman to communicate with the telegraph operator?

A. Yes sir.

Q. 33. What did he tell Mr. De Atley to do?

A. To call up the operator at Springdale and see if he had any time on No. 1 for him.

Q. 34. What did he mean by that?

A. To call up the operator and let him know whether No. 1 was on time or late and see if he had any time for him.

Q. 35. If she was on time and you had gone on ahead, what would have been the consequence?

A. We would have had time enough to get to Maysville on ahead of her.

Q. 26. Supposed the "Fast Flyer" had been on time, though, what would have been the consequences if you had gone on?

A. We could go ahead of her until they gave an order to clear the train at such a time. I don't know, though, whether
101 or not that would be necessary on a single track. Now they give you time on your runs since they have a double track.

Q. 37. Why wouldn't they give you the orders when they had a single track?

A. The engineer and conductor had to look out for that part of it. They had to take the responsibility themselves to see them clear for trains.

Q. 38. So it was a matter of some concern to Mr. Kavanaugh to see that everything was clear on this occasion, wasn't it?

A. Yes sir.

Q. 39. And he got no information at all from the operator at Springdale because the phone was out of order?

A. De Atley said he could not get him; that is all I remember of him saying.

Q. 40. And De Atley reported that to the engineer?

A. Yes sir.

Q. 41. What was it the engineer said?

A. He said "Never mind, let it go, we have time to go ahead of them".

Q. 42. There was nothing further De Atley could do at Springdale after he failed to get the operator?

A. No sir.

Q. 43. He had time to go from Springdale to the coal docks?

A. Yes sir, he had time to go and get coal.

Q. 44. As to going further on down to Maysville that was a matter of another concern, after they got down there?

A. Yes sir.

102 Q. 45. Was this De Atley's first trip on your train?

A. That was the first time I saw him that night when we left Russell on #95; that was the first time ever I saw him.

Q. 46. This was a manifest train carrying perishable goods from one state to another?

A. Yes sir.

Q. 47. Taking the cars on into Cincinnati?

A. Yes sir.

Q. 48. What time of day was it De Atley got hurt?

A. I don't believe I can remember the time exactly now, but somewhere around six o'clock; it was a little later than six o'clock, I think.

Q. 49. Somewhere between six and seven?

A. I don't know exactly what time it was; I could not say.

Q. 50. Somewhere near six o'clock in the morning?

A. Yes sir, somewhere near there.

Q. 51. Had there been any snow or sleet the night before?

A. There was just a slight snow that stuck on the ground.

Q. 52. Those cars that came in from West Virginia, didn't they have sleet on them?

A. Not as I remember, they didn't.

Q. 53. Had the snow melted off the steps at six o'clock that morning?

A. I swept the deck of the engine when we were in the passing track and, as I remember, I swept off the steps too, but there wasn't anything on the steps that I know of.

Q. 54. Where did you do that?

A. At Springdale on the passing track.

Q. 55. When you swept the deck and steps, what was it that you swept off of them?

A. Coal off the deck.

Q. 56. Did you sweep any snow off?

103 A. Not off the deck.

Q. 57. Where did you sweep the snow off?

A. I swept the steps off.

Q. 58. Was there snow on the steps?

A. I don't know whether or not there was snow on the steps. If there was a full tank of coal that could have shook down on the steps.

Q. 59. You said there was snow a while ago, didn't you?

A. I said there was a light snow on the ground.

Q. 60. Hadn't some gotten on the cars?

A. I wasn't back on the cars and don't know.

Q. 61. But you did see some on parts of the engine, didn't you?

A. I cannot say that I did. It was just a light snow on the ground.

Redirect examination:

Q. 1. The blocks were down at the Fair Grounds and you were on the main track, were you not?

A. Yes sir, on the west bound track and it was a single track there in those days. From the east end at the Fair Grounds to the west end at Broshears then was all the double track. There was no block indicating that there were any orders for the train at the Fair Grounds.

A. There was a white block, a no order board out.

Q. 3. What does a white block mean?

A. To proceed, that it is clear to the next station.

Q. 4. Do you remember what time in the morning it was that this accident happened?

A. I don't remember, but it was somewhere around six o'clock, I guess, or a little after.

104 Q. 5. To recall your mind to the time,—you were running ahead of No. 1?

A. Yes sir.

Q. 6. And No. 1 was due in Maysville between eight and nine?

A. I don't know just when she was due there. She was due in Covington at ten something, I think, and we were ahead of No. 1.

Recross-examination:

Q. 1. No. 1 had the right of way, didn't she?

A. Yes sir, she is a first-class passenger train.

Re-redirect examination:

Q. 1. It didn't have the right of way at the Fair Grounds that morning, did it; I mean there was no block out there to indicate that you were in the way of No. 1?

A. No sir, we were ahead of No. 1 and had time to go to Maysville and back over.

Q. 2. Where were you going to in Maysville to back over?

A. Down to the cross-over at the depot there.

Q. 3. And you had plenty of time to do that?

A. Yes sir, plenty of time.

And further saith not John Rice.

Also at the same time and place the witness, WILLIAM MARTIN, who being of lawful age and having been first duly sworn, testified as follows:

Q. 1. What is your age, Mr. Martin?

A. I am twenty-eight years old.

Q. 2. Where do you live?

A. In Covington, Ky.

105 Q. 3. What is your occupation?

A. I am employed as brakeman and conductor on the C. & O. Railroad.

Q. 4. Are you a conductor now?

A. No sir, I am a brakeman now on the C. & O.

Q. 5. How long have you been connected with the C. & O.?

A. Seven years last March.

Q. 6. During that time has your occupation been that of a brakeman and conductor?

A. Yes sir, brakeman and conductor both.

Q. 7. Were you working for that Company January 22, 1911, the morning young De Atley was hurt?

A. Yes sir.

Q. 8. What was the number of your train?

A. No. 95.

Q. 9. A freight train?

A. Yes sir.

Q. 10. What did they call it; what is it known as?
A. A manifest train.
Q. 11. What is a manifest train?
A. Why, it is a train that has to be given better service than one hauling common freight and, I think, a little more expense is attached to the shippers; it is a through freight, a rush freight.
Q. 12. How many cars had you in that train that morning?
A. Fifty-nine.
Q. 13. Do you remember stopping at Springdale?
A. Yes sir.
Q. 14. What was that stop made for?
A. We pulled in on the passing track for No. 98.
106 Q. 15. Which way was No. 98 going?
A. East.
Q. 16. After No. 98 went east, what did your train do?
A. We pulled out and came west.
Q. 17. Did you get any orders in Springdale as you went through?
A. Yes sir.
Q. 18. How did you get that order?
A. I got two orders; I got one order and two copies of it; an order that number one was running ten minutes late.
Q. 19. What did ten minutes on number one mean?
A. That she was ten minutes behind her schedule, and we had ten minutes' additional time.
Q. 20. What did you do with the order?
A. I kept it until we got to the Fair Grounds stop and then came over to the head end with it.
Q. 21. Where did they stop at the Fair Grounds?
A. The engine stopped about the coal docks.
Q. 22. They were up about the brick yard?
A. Yes sir, at the east end of the brick yard.
Q. 23. When they stopped there to coal, what did you do?
A. I hurried over to the head end, because I knew we wouldn't be there longer than it would take me to come over. I went over on the ground until they started to move, and then I got on top and came over on the cars.
Q. 24. Those cars in the manifest train, are they box cars?
A. They don't necessarily have to be, but they usually are.
Q. 25. And you went on top of them?
A. Yes sir, after the train started to move.
Q. 26. Did you give any signal to the engineer to start the train?
A. Yes sir, after he called in the flag I gave him a signal
107 to go ahead.
Q. 27. Where were you when you gave that signal?
A. I was along about ten car lengths from the engine, and on top of the car.
Q. 28. When you gave the signal to go ahead, what took place?
A. He answered it, and then started. He gave two short blasts of the whistle, which answers any signal.
Q. 29. And then started ahead?
A. Yes sir.

Q. 30. Did you see the man on the platform at the tower?

A. When we got up further, yes sir, I did, before we got to the tower, but I hadn't got to the engine then. I was going over the tank on the engine as the engine passed the tower and down into the cab.

Q. 31. How were the blocks at the Fair Grounds?

A. The blocks were clear.

Q. 32. What do you mean by "clear"?

A. They were O. K. to proceed.

Q. 33. To go ahead?

A. Yes sir.

Q. 34. Did you say you saw the man when you were coming down off the car into the engine?

A. Yes sir, I saw him when we were a hundred feet east of the cabin where he was standing.

Q. 35. Did you see him try to get aboard the engine?

A. No sir, I was right on top of the tank as the engine passed the tower, and that was the time he attempted to get on.

Q. 36. You were not in the engine riding from Springdale to the coal docks at all?

A. No sir, I was in the caboose from Springdale to the coal docks.

Q. 37. Tell the jury what the custom is with reference to orders being given the engineer with reference to moving the train, to the engineer and conductor?

108 A. In case they are given an order to operate the train; when they hand it on, if it is a 19 order, that is an order that does not require you to sign. In such cases as that one at Springdale, we were given the privilege of using ten minutes on number one. If we hadn't had that order, we would have had to clear number one on her schedule of time on the time card. In case he wants to operate you with any superior train, he can give you 19 orders from other causes than to operate you. It is an order that can be handed on by the operator. But 31 orders must be signed; it takes your rights away from you and restricts you in one way or another. It may not permit you to pass any station or siding before a certain time or it may be a positive meeting order. If you get a positive meeting order with train, and you are the superior train, you get it on a 31 order, and if you are an inferior train, you can go out on a 19. When they give a 19 order, it does not matter much whether or not they get it, so far as action is concerned. If you don't get a 19 order; there is no cause for danger, because you will not be able to proceed as far. With a 31 they have to give it to you before they can give it to the inferior train.

Q. 38. Was the east bound track occupied the morning of January 22, at the time this accident occurred?

A. At the Fair Grounds, yes sir.

Q. 39. Toward the tower?

A. Yes sir.

Q. 40. What occupied it?

A. A light engine and caboose.

Q. 41. After the accident to the young man who was hurt, was

he placed aboard the caboose attached to the light engine and brought to Maysville?

A. I suppose he was after we left there. In fact, I know he was, but I didn't see it.

109 Q. 42. State whether or not there is any custom on the C. & O. Railroad for brakeman to leave trains and engines to go to telegraph offices and get orders and bring them back while the train is in motion; to go to the telegraph tower and come back and board the train while it is in motion?

Plaintiff objects to the question; the court overrules the objection, to which plaintiff excepts.

A. I will say that it is customary for the brakeman, after he is through with what work he has to do, especially in cold weather, to go to the office, sit down, and sometimes he may be there for an hour or two, and maybe six or seven hours, that was when he had the single track. It is customary for the head man, providing his train is running all right, and he has no duties to stay in the office.

Q. 43. While he is in the office, if there are any 19 orders, is it customary to take them to the engineer?

A. Yes sir, if it is for his train, the operator gives it to him, and it is customary.

Q. 44. Is there any custom on the road for brakeman to leave the engine to go a quarter of a mile ahead to the telegraph tower to get an order, or see if there is an order?

Plaintiff objects to the question; the court overrules the objection, to which plaintiff excepts.

A. Why, I haven't known of any case to amount to anything where any one walked that distance. In fact, there are very few offices where a man could walk that distance. I take it for granted, a man don't go to the office unless they are in a side track, and he has no other duties to perform.

Q. 45. Have you ever known of a brakeman leaving the train to go to the telegraph office a quarter of a mile ahead of where the train was being coaled, when the blocks are open, and you have the right of way on the main line, to go ahead to get an order and go back to the engineer as he comes through?

110 Plaintiff objects to the question, the court overrules the objection, to which plaintiff excepts.

Q. 46. Is there any duty imposed on the brakeman to do anything of that kind?

A. No sir.

Q. 47. Is there any custom among brakemen whereby they leave an engine under those conditions, and go a quarter of a mile ahead to the tower, when the blocks are open and the train that he leaves has the right of way, and there are no orders to be received, and he goes down there to get an order and comes back to get on the train as it passes through?

Plaintiff objects to the question; the court overrules the objection, to which plaintiff excepts.

A. No sir. I have never known them to go a great distance to the office.

Q. 48. When they go to the office, where is their train generally, with reference to the office?

A. Generally the sidings where the engine stops are not more than a hundred to a hundred and fifty feet from the office. The way the sidings were situated when we had the single track there, the tower stood between the two sidings, and when the engine came up there you wouldn't have over a hundred or hundred and fifty feet, hardly more than a hundred, to go to the office.

Q. 49. And in cases of that kind, you said the brakeman leaves the train when he has finished looking over his train, and goes to the office, and if there is an order there, he takes it back to the engine?

A. Yes sir.

Q. 50. What are the duties of the head brakeman when the train stops for any length of time to coal, etc.?

A. The duties, according to rules, are that when a train stops for coal or water the engine is cut off, and I don't know any special rule, saying what a man shall do at that time, except
111 that he must look after his train.

Q. 51. What do you mean by that?

A. He must watch for hot boxes, or there might be a broken flange or draw bar, or bad couplers, or such as that. In short, he must look for anything that might be defective in the train. Sometimes cars are found that have to be set out.

Q. 52. That is, he should occupy his time while the train is stopped in looking over the cars in the train to ascertain whether or not they are in good condition?

A. That is it.

Q. 53. This manifest train, the engine didn't have to be uncoupled from the train?

A. I believe there was a ruling at that time that manifest engines didn't have to be cut off. I know the order was put out and changed at different times, and I think the order was that manifest engines didn't need to be cut off.

Q. 54. At that time at Concord, do you know the situation of the office there at that time, as to the office and telephone and water tank?

A. Yes sir, I know about it.

Q. 55. What was it where the engine stopped?

A. An engine stopping on a west bound train to take water, the front of the engine would stop almost in front of the depot, not ten feet from it and the switch where they head in on the west bound passing track was about forty feet from where the engine stopped while taking water, and the office is located about half a mile west of there.

Q. 56. Was there any communication between?

A. There is a telephone on the outside of the depot connecting with the operator.

Q. 57. It is half a mile away?

112 A. About half a mile, I don't know the distance exactly, but about sixty-five car lengths, I know.

Q. 58. Any one wanting to ascertain the movements of a train coming west on a freight train at Concord, where would he go to get it?

A. He would have to call up.

Q. 59. Where would that be?

A. At the telephone at the depot. There have been cases where the man could not go any further for a superior train going east, but he could go to the telephone there and inquire if there were any orders helping him with any train he needed help on.

Q. 60. On a west bound train stopping there at the water tank, you could go right to within a short distance, 40, 50, or 60 feet, to the telephone?

A. Yes sir, it is just a little ways from there. I expect 40 feet from the engine to the telephone.

Q. 61. With the ten minutes additional time you got, where did it enable you to go with your freight train ahead of number one?

A. We were able to get to Maysville on it, and we got five minutes more at Maysville, fifteen all told, and then we went to Broshears, and headed in before number one at Broshears.

Q. 62. What did you do with the order?

A. I gave it to the engineer.

Q. 63. You say you got two copies of that?

A. Yes sir.

Q. 64. Why was that?

A. The conductor and the engineer must each have a copy of all orders and it states the same on the order and each are held responsible for everything that is done.

Cross-examination:

113 Q. 1. You were the brakeman on that occasion?

A. No sir, I was the conductor.

Q. 2. And you received orders at Springdale?

A. Yes sir.

Q. 3. How soon after the train got there did you receive those orders?

A. Well, I cannot tell you. He didn't put the order out until 98 had passed, and we were able to move. As long as 98 had the line, we had no right on the main line, but as soon as 98 had gone we were entitled to the main line until some other superior train was due. The next train was number one, as soon as 98 had passed, the order was put out ten minutes on number one, which was delivered to me on the rear end. The office is at the east end of the passing track, and I could not deliver it to the engineer without stopping him, and that would have been a loss of more than the ten minutes we had out, and I let them pull on over to the coal docks, and went

over when he was there, and got within ten or twelve cars of the engine when he called in the flag.

Q. 4. Where were you along the way when you got into the car, that is into the engine?

A. We had just passed the cabin, the Fair Grounds telegraph office.

Q. 5. That is beyond the tower, is it?

A. The tower is the office.

Q. 6. And you got in the engine when you had just pa[illegible] that tower?

A. Yes sir, just by it.

Q. 7. And then you delivered the message to the engine?

A. Yes sir; the engineer was applying the air.

114 Q. 8. And you delivered the order at that time to the engineer, Mr. Kavanaugh?

A. Yes sir, I thought he was going to head in there for number one, and I wanted to tell him that we had time enough on number one to go to Maysville and go ahead of number one.

Q. 9. And you went over eight or ten cars, and went in there and delivered these orders to him?

A. Yes sir.

Q. 10. How long did you wait at Springdale for 98, the train going east?

A. I don't remember now, but we were in there sometime.

Q. 11. Was this No. 98 another manifest?

A. Yes sir, a manifest train going east.

Q. 12. And it had the right of way as between you and it?

A. Yes sir.

Q. 13. And in order to let it go east you had to go on which track?

A. The passing track.

Q. 14. That is equivalent to a switch track, is it?

A. It is generally known as a passing track where trains pass on through, or a side track, in ordinary railroad conversation.

Q. 15. In common parlance they speak of it as a switch, don't they?

A. You clear the main line that is all.

Q. 16. It is a side track besides the main line?

A. Yes sir, for the purpose solely of getting off the main line.

Q. 17. If you hadn't, after 98 had gone by, gotten any orders with reference to number one, what would have been your duty?

A. We would have gone just the same.

115 Q. 18. But not so far?

A. No.

Q. 19. You would have to go on your own responsibility, but not go so far?

A. We could go on our own responsibility even after we got it, but we could proceed further with ten minutes than we could without it.

Q. 20. But if you hadn't gotten the order informing you the train was ten minutes late, you wouldn't have gone so far?

A. No sir, but circumstances govern those things to a certain ex-

tent. If we went from there and the engineer stopped at the coal docks five minutes you can get a lot further than if he stands twenty-five.

Q. 21. When at the coal docks were you on the main line or sidings?

A. The main line.

Q. 22. The track number one would have come on?

A. Yes, sir.

Q. 23. Was it not then the custom and rule for the head brakeman to ride in the engine, and the rear brakeman in the caboose?

A. When the train is in motion and it is not necessary for him to be out for any reason, such as giving the signal from the rear end, he has a right in the engine.

Q. 24. And the rear brakeman in the caboose?

A. Yes sir, as long as he don't have to get off or have any other duties to perform.

Q. 25. So, as conductor, if you didn't find the rear brakeman in the caboose when the train was in motion, you would suppose something was wrong, wouldn't you?

A. When we pulled out of the station at Springdale the rear man closed the switch and left it set for the line. The head man would see that the switch was closed, and after it was closed he would
116 receive a signal from the rear end, and in case we were moving too fast for the rear man to get the train after closing the switch, it was the duty of the conductor to stop and let him on.

Q. 26. After your train is in motion and you are under way, if you should miss your brakeman from the caboose you would naturally think there was something wrong, wouldn't you?

A. You might know where he was and you might not. If you had been running on the time of a superior train, you would have a right to assume he had dropped off to protect that train from hitting you.

Q. 27. Under what conditions would you have the right to assume he had dropped off?

A. If we were going along and there was nothing to do for three or four hours, and you dropped back to the caboose and didn't find him there, you wouldn't know where he was; although if there was something to do wherever you stopped that was the rear brakeman's duty he might get left at any point.

Q. 28. About how fast was this train running when it reached the tower house that day?

A. I judge about ten or eleven miles an hour.

Q. 29. Is the head brakeman subject to the orders of the engineer?

A. Yes sir.

Q. 30. And the rear brakeman subject to the orders of the conductor?

A. Yes sir, and the engineer too if he happens to be where the engineer needs him for anything.

Q. 31. Had Mr. De Atley ever traveled on this train or worked on this train with you before?

A. I worked the day before on a work train at Riverton, from Russell down about fifteen miles.

117 Q. 32. Did you recognize him when he got on the train with you at Russell as being the same man you had seen the day before?

A. Yes sir.

Q. 33. Did you see him as the train approached the tower the day of the accident?

A. Yes sir.

Q. 34. Did you recognize him then as the same man?

A. Yes sir.

Q. 35. Who gave the engineer the signal there at the docks to start?

A. I did.

Q. 36. Who gave the engineer the high ball there at the docks to start?

A. I did.

Redirect examination:

Q. 1. That east bound track at the Fair Grounds was occupied by an engine and caboose that morning?

A. Yes sir.

Q. 2. On the regular schedule time of No. 1 you had time to come into Maysville and go over and the additional time you got took you clear to Broshears?

A. Yes sir.

Q. 3. That is where No. 1 passed you?

A. Yes sir, at Broshears.

Q. 4. Do you know how long you stopped at the coal docks?

A. I judge about ten minutes.

Q. 5. While they stop at the coa*k* docks*t* to coal, is it customary for brakemen to go back and look over the train?

A. Yes sir.

Q. 6. After the train starts up to go ahead, the brakeman can climb on the train, can't he?

A. Yes sir, lots of times he does.

Q. 7. Isn't that very usual?

118 A. It is customary for them to catch the train in case the train starts while he is back looking it over, and in some cases, especially in warm weather, they ride out there.

Q. 8. They stay out there and ride?

A. Yes sir. He may come over at the next water tank to cut the engine off. It is customary for the brakeman to ride out until he comes to the water tank where he has to cut water off and up to the switch where they head into the passing track for another train.

Recross-examination:

Q. 1. You say it is customary for them to do that in warm weather?

A. Yes sir.

Q. 2. They don't usually ride out in winter, do they?

A. No sir.

Q. 3. What would you have done there at Springdale if you hadn't gotten those orders and information in regard to No. 1?

A. We would have pulled out of there just the same. If we could not have left there without the orders on No. 1, the engineer would not have pulled out of there, because if he never received them at Springdale he had time enough to leave there without them.

Q. 4. I believe you said a while ago, not finding orders, you would not go as far as you would with orders, and the train was ten minutes late?

A. Sometimes ten minutes won't benefit you in the least. They would deliver the order to me and it was my duty to deliver a copy to the engineer, and I could not stop him there to deliver them or I would lose the ten minutes I had gained.

Re-redirect examination:

Q. 1. When the head brakeman gets aboard a freight train
119 after it has been started, at a point back of the engine, it don't take long in cold weather to walk over the cars and get on the engine?

A. That depends on where he is and what kind of cars he has. An experienced man can walk on box cars as well as on the street.

Re-recross-examination:

Q. 1. An inexperienced man will hardly undertake to do that, will he?

A. I don't know. Sometimes I hire boys on the road that are more active than experienced men, but others are not. It is no trouble to walk a freight train of box cars, even when they are moving. Of course, if you have to climb over empty "Gons." it is quite a job.

Q. 2. Did you have any Gondolas on this train?

A. Not to my knowledge now. I don't remember of having any, but that was pretty near three years ago and we had 59 cars.

Q. 3. It is a rare thing when you have 59 cars on a train without a few Gondolas, isn't it?

A. I have known of manifest trains as many as 75 or 80 cars without any "Gons."

Q. 4. It is very frequently the case that they have Gondolas on manifest trains, isn't it?

A. Yes sir, they have Gondolas on manifest trains as well as on others.

Q. 5. Did they have any flat cars on this occasion?

A. Flat cars are usually operated in the rear of the train.

Q. 6. What is your recollection about flat cars on this occasion?

A. I don't know that I had any, but of course, they are operated as well as Gondolas and box cars.

120 Q. 7. It is a common thing to haul them?

A. Yes sir, I know I walked over box cars when I got to the head end.

And further saith not Wm. Martin.

The witness, A. J. Boyd, being of lawful age, and having been first duly sworn, testified as follows:

Q. 1. Were you in January 22, 1911, the telegraph operator at the Fair Grounds tower?

A. Yes sir.

Q. 2. Do you remember No. 95 going through that morning?

A. First 95, yes sir.

Q. 3. Did Mr. De Atley, the plaintiff in this case, come in your tower?

A. Yes sir.

Q. 4. What did he ask you?

A. He said, "Have you anything on No. 1," and I asked the despatcher and he said, "No. 95 has ten minutes on No. 1, we are expecting her back over here at Maysville, and I turned around and told him.

Q. 5. Did Mr. De Atley then leave the tower?

A. No sir, he stayed and waited for the train to come.

Q. 6. After he saw the train, did he go down out of the tower?

A. Yes sir, I guess he started out of the office when they got about 80 or 90 feet east of the office he started down the steps, or, possibly, it may have been a little further.

Q. 7. Did you see him when he fell?

A. Yes sir.

Q. 8. How did he fall?

A. He stood on the platform, and made a leap for the train, and his left or right foot failed in making it and he fell, and I sat down, as I didn't want to see any more, and after it passed he was there with his leg cut off.

Q. 9. What is the custom of the telegraph operators on the C. & O. with reference to delivering orders on trains?

121 A. A 19 order is executed by the chief despatcher. An operator is supposed to hand it on the engine for the engineer, and on a caboose for the conductor.

Q. 10. Is it handed on to the engineer while the train is in motion?

A. Yes sir. They class it as a 19 order so it can be handed on while the train is in motion to keep from stopping the train.

Q. 11. How were your blocks, with reference to first 95?

A. They were white which means clear to come on through.

Q. 12. Was the east bound main occupied?

A. No sir, not at the time, but a train, I think, came up there in a short time, in or about the time 95 got through. I think that a work train came up there.

Q. 13. An engine with a caboose.

A. Yes sir, came in on the eastern and stopped at the home block about a hundred yards west of the office.

Cross-examination:

Q. 1. You say he came and asked you about No. 1?

A. Yes sir.

Q. 2. About how long did it take you to get the information for him?

A. About half a minute, I guess.

Q. 3. What did you have to do to get the information?

A. Asked if there was anything for 95 on No. 1, and he said "There is ten minutes on it."

Q. 4. And you sent the telegram and got the information from the despatcher?

A. Yes sir. Of course, we abbreviate in asking questions, so as not to take so much time.

Q. 5. After you gave him this information, then you say he waited there?

A. Yes sir.

122 Q. 6. How long was he there before he started down the platform?

A. Do you mean how long was he up in the office in all?

Q. 7. Yes.

A. Well, possibly, I guess a couple of minutes, it may be less, and it may be more, but in that neighborhood.

Q. 8. Take it from the time he came to the time he left?

A. Well, it was a couple or three minutes, I could not tell exactly as I didn't pay much attention to it.

Q. 9. How close was the train to the tower when he got on the platform?

A. Well, it was pretty close when he got on the platform, because the train was coming before he started down the steps, and by the time he got to the platform, I judge it was possibly 30 or 40 feet from him, or a little more or less, I didn't pay particular attention to it.

Q. 10. 30 or 40 feet from where he was standing when he got down?

A. Well, maybe not so far, I didn't pay much attention. I told him he had better go up the track if he wanted to get on the train, for I saw he was a green man, but he didn't pay any attention to me.

Redirect examination:

Q. 1. Is it customary for a brakeman to go ahead of his train a quarter of a mile after it has stopped and board it when it goes through, a Manifest train?

A. I am supposed to hand those 19 orders on.

Q. 2. What I asked you is this, is it customary for brakemen to get off a train, walk a quarter of a mile, and then get on the train when it passes?

Plaintiff objects to the question, the court overrules the objection, to which plaintiff excepts.

123 A. It is not.

And further saith not A. J. Boyd.

Rebuttal Testimony.

The witness, JOHN J. DE ATLEY, having been recalled by plaintiff, testified as follows:

Q. 1. Mr. De Atley, Mr. Rice, the fireman on the train that injured you, said, as I recall, that at Springdale you had a conversation with Mr. Kavanaugh, where he said, after you informed him that you could not get any communication with the operator, that it did not make any difference as he had the time, anyhow, or words to that effect; did you have any such conversation?

A. No, sir, he said nothing to that effect that I heard.

And further saith not J. J. De Atley.

The foregoing was all the evidence offered or introduced by both the plaintiff and defendant, and at the conclusion of all the testimony the defendant moved the court to peremptorily instruct the jury to find for it, to which the plaintiff objected, and the court upon consideration of said motion and objection, overruled said motion and sustained said objection, to which ruling the defendant excepted.

Thereupon the court of its motion instructed the jury as follows:

Instruction No. 1.

"The court instructs the jury that if they believe from the evidence that defendant's engineer, upon the train in question, directed the plaintiff to go to defendant's tower, or knew that plaintiff was at said tower upon business connected with the operation of said train, then it was the duty of the defendant, its agents and servants in charge of said train, to exercise ordinary care to operate said train at such rate of speed as not to make plaintiff's attempt to board said train under all the facts and circumstances proven
124 in this case, unusually hazardous; and if the jury believe that the defendant, its agents and servants in charge of said train, negligently failed to perform said duty, and the plaintiff was injured by reason of such failure, if any, then the law is for the plaintiff and the jury will find as indicated in instruction No. 3."

To the giving of this instruction both plaintiff and defendant at the time objected, and the court having overruled said objections, both the plaintiff and the defendant excepted to said ruling of the court and to the giving of said instruction, and still except.

Thereupon on motion of defendant, the court gave the following instruction, to-wit:

Instruction No. 2.

"The court instructs the jury that if they believe from the evidence that the plaintiff went to said tower of his own volition, and that defendant's engineer did not know of his presence thereat, then the law is for the defendant and the jury will so find."

To the giving of this instruction the plaintiff at the time objected and the court having overruled his objection, plaintiff excepted to said ruling and to the giving of said instruction and still excepts."

Thereupon, of its own motion, the court gave the following instruction, to-wit:

Instruction No. 3.

"If you find for plaintiff under Instruction No. 1, then you will ascertain from the evidence such sum as will reasonably compensate plaintiff for the pain and suffering, if any, which he has endured, and which it is reasonably certain that he will hereafter endure, if any, as a direct result of said injury, and such further sum as you may believe from the evidence will reasonably compensate plaintiff for the impairment, if any, of his power to earn money; but the sum so found shall not exceed $25,000.00. But if the jury find the plaintiff guilty of contributory negligence under instruction No. 4, then they shall diminish the sum found as above, if any, as indicated in said instruction No. 4."

Thereupon the court on motion of defendant, after its refusal to give instruction "G," offered by defendant, gave the following instruction, to-wit:

Instruction No. 4.

"The court instructs you that in the event you should find the defendant negligent under instruction No. 1, then you must also consider the question as to whether or not the plaintiff was negligent. If you believe from the evidence that the plaintiff negligently undertook to get upon the train in question while it was running at a rapid and dangerous rate of speed, or if he failed to exercise such care for his own safety as a person of ordinary prudence, situated as he was, would usually exercise, and but for this would not have been injured, then, in any of these events, the plaintiff himself was guilty of contributory negligence, and if you should so find, then even though you should believe the defendant negligent under instruction No. 1, yet because of plaintiff's own negligence he is not entitled to recover full damages sustained by him as result of the accident and injury sustained to him, but only to such proportional amount as the negligence, if any, of the railroad company bears to the entire negligence of both. Therefore, even though you find for plaintiff under instruction No. 1, yet if you further find the plaintiff also negligent under this instruction, then you will diminish the damages, if any, awarded to plaintiff, in proportion to the amount of the plaintiff's own negligence if any."

To the giving of this instruction the plaintiff at the time objected, and the court having overruled said objection, plaintiff excepted to the ruling of the court and to the giving of said instruction and still excepts.

Instruction No. 5.

"The court instructs the jury that ordinary care, as used in these instructions, means that degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care."

The defendant also moved the court to give to the jury the following instruction marked "G."

Instruction No. "G."

"The court instructs you that in the event you find the defendant negligent under instruction No. 1, then you must also take into consideration the question of the plaintiff's negligence. The court instructs you that the plaintiff, in attempting to board the train in question, was himself negligent and that even though you find the defendant negligent under instruction No. 1, yet because of plaintiff's own negligence he is not entitled to recover the full damages sustained by him as a result of the accident and injury to him, but only to such proportional amount as the negligence, if any, of the railroad company bears to the entire negligence of both. Therefore, even though you find for plaintiff under instruction No. 1, you will diminish the damages awarded to him in proportion to the amount of plaintiff's own negligence."

And the court being sufficiently advised, overruled defendant's motion to the giving of the above instruction, and refused to give same; to which action of the court defendant at the time excepted and still excepts.

127 Thereupon the defendant moved the court to give to the jury the following instruction marked "H:"

Instruction No. "H."

"The court instructs the jury that when the plaintiff, John J. De Atley, entered the service of the defendant, railroad company, as brakeman, he assumed all the ordinary risks and hazards of that employment or occupation; and if they should believe from the evidence that the plaintiff's injuries complained of were the natural and direct results of any of said risks or hazards, then they must find for the defendant."

And the court being sufficiently advised, overruled defendant's motion to the giving of the above instruction, and refused to give same; to which action of the court the defendant at the time excepted and still excepts.

Thereupon, plaintiff moved the court to give to the jury instructions "A," "B," "C," "D," "E" and "F" as follows to-wit:

(Here insert.)

And the court being sufficiently advised overruled plaintiff's motion to give said instructions and each of them, and refused to give same, to which rulings of the court plaintiff in each instance at the time objected and excepted and still excepts.

Thereupon, upon argument by counsel for both plaintiff and defendant, the jury retired to their room and after a while returned into court the following verdict:

"We, the jury, find for the plaintiff in the sum of $9,050.

JOHN R. DOWNING."

128 Thereupon, the court rendered judgment for the plaintiff pursuant to said verdict, and defendant thereupon filed its motion and grounds for a new trial, which motion and grounds are in words and figures, as follows, to-wit:

Mason Circuit Court.

JOHN J. DE ATLEY, by, &c., Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Motion and Grounds for New Trial.

Comes the defendant and within the time allowed by law, moves the court to set aside the verdict of the jury and the judgment rendered herein, and grant it a new trial, and assigns these as its grounds in support of said motion:

1. The verdict is contrary to law.
2. The verdict is opposed to the overwhelming weight of the evidence, and is the result of passion and prejudice on the part of the jury against the defendant.
3. The verdict is grossly excessive and is the result of passion and prejudice on the part of the jury against the defendant.
4. Error of the trial court in admitting certain incompetent and irrelevant testimony offered by plaintiff; to the introduction of which testimony the defendant at the time and in each instance objected and excepted.
5. Error of the court in excluding certain competent and irrelevant testimony offered by defendant; to which action of the court the defendant at the time and in each instance excepted.
6. Error of the court in overruling defendant's motion to instruct the jury peremptorily to find for it, made at the close of plaintiff's testimony; to which action of the court the defendant at the time excepted.

7. Error of the court in overruling defendant's motion to
129 instruct the jury peremptorily to find for it, made at the close of all the evidence; to which action of the court the defendant at the time excepted.

8. Error of the court in giving to the jury instruction # 1, to

which action of the court the defendant at the time objected and excepted.

9. Error of the court in refusing to give to the jury instructions marked "G" and "H;" to which action of the court in refusing to give each of said instructions, the defendant at the time and in each instance objected and excepted.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Defendant.

And the court not being sufficiently advised, took time. And thereafter, to-wit, at the December term, 1913, the court being sufficiently advised, overruled said motion and ground for a new trial, to which ruling of the court the defendant excepted and prayed an appeal to the Court of Appeals, which was granted, and the defendant was given until the tenth day of the March term, 1914, of this court to tender and file its bill of exceptions therein.

Whereupon comes the defendant and within the time allowed it, presents the foregoing bill of exceptions, and asks that the same be signed and approved by the Judge of this court, and found and certified to be true, and to contain all the evidence offered, introduced or heard, and all the instructions given, offered or refused; all of which is accordingly done, found and certified, and the same is now ordered to be made a part of the record without being spread at large on the order book.

C. D. NEWELL,
Judge of the Mason Circuit Court.

130 STATE OF KENTUCKY,
Mason Circuit Court:

I, James B. Key, Clerk of the Mason Circuit Court, do hereby certify that the foregoing annexed 94 pages contain a full, true and complete transcript of the record and proceedings had in said court in the case therein mentioned.

Witness my hand this 4th day of February, 1914.

JAS. B. KEY, *Clerk.*

131 CHESAPEAKE & OHIO RAILWAY CO., Appellant,
vs.
JOHN J. DE ATLEY, Appellee.

Bond.

Upon an appeal from a judgment of the Mason Circuit Court, rendered at its September Term, 1913,

Whereas, Said appellant, Chesapeake & Ohio Railway Company, has prayed an appeal from the Judgment of the Mason Circuit Court, rendered at its September Term, 1913, against it in favor of the appellee, John J. De Atley, for the sum of Nine Thousand & Fifty Dollars. And the appellants desire- to supersede the said Judgment above mentioned,

Now, we, W. D. Cochran and Le Wright Browning, sureties, do hereby covenant to and with the appellee, John J. De Atley that the appellant will pay the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the said judgment above stated, in case it shall be affirmed and any judgment or order which the Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid.

Witness our hands, this 12th day of January, 1914.

W. D. COCHRAN.
LE WRIGHT BROWNING.

132 Filed 12th day of January, 1914.
Attest:

JAS. B. KEY, *Clerk.*

Mason Circuit Court.

C. & O. Ry. Co., Appellant,
vs.
John J. De Atley, Appellee.

Supersedeas.

I do certify that an appeal has been granted by the Mason Circuit Court from a judgment rendered at its September term, 1913, in favor of John J. De Atley, Appellee, against C. & O. Ry. Co., Appellant for $9,050.00 and that a Supersedeas Bond has been executed. Therefore the Appellee and all others are *commenced* to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said Court, this 12th day of January, 1914.

JAS. B. KEY, *C. M. C. C.*

133 With the foregoing transcript, the appellant by its counsel, filed a statement which is in words and figures as follows, to-wit:

134 Court of Appeals of Kentucky, April Term, 1914.

The Chesapeake and Ohio Railway Company, Appellant,
v.
John J. De Atley, Appellee.

Statement on Appeal.

Comes the appellant, and files this its statement on appeal pursuant to the requirements of section 739, Civil Code:

a. Appellant, The Chesapeake and Ohio Railway Company.

b. Appellee, John J. De Atley.

c. The judgment appealed from was rendered on the 19th day of September, 1913, at the September term of Mason circuit court, and may be found on page 12 of the record.

d. No summons on appeal is necessary.

e. The attorneys for appellee are A. D. Cole, of Maysville, Kentucky, and Holmes & Ross, of Carlisle, Kentucky.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Appellant.

135 Afterwards at a Court of Appeals, held as aforesaid, on the 13th day of April, 1914, the following order was entered, to-wit:

Mason.

CHESAPEAKE & OHIO RAILWAY COMPANY
v.
DE ATLEY.

Came the appellee by counsel and filed notice and motion to advance this case under Rule 6, being the second appeal, which motion being heard is sustained and this case is ordered to be advanced.

Afterwards at a Court of Appeals held as aforesaid, on the 6th day of May 1914, the following order was entered:

Mason.

C. & O. RY. CO.
v.
DE ATLEY.

Ordered that this case be submitted.

Afterwards, at a Court of Appeals, held as aforesaid, on the 19th day of June, 1914 the following Judgment was entered herein:

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
JOHN J. DE ATLEY, Appellee.

Appeal from the Mason Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant ten % damages on the amount of the judgment superseded herein, which is ordered to be certified to said Court, whole Court sitting, Judge Carroll dissenting.

136 At the same time to-wit: June 19, 1914, the Court of Appeals delivered an opinion, which is in words and figures following, to-wit:

137 Court of Appeals of Kentucky, June 19, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
JOHN J. DE ATLEY, Appellee.

Appeal from Mason Circuit Court.

Opinion of the Court by William Rogers Clay, Commissioner, Affirming.

In this action for damages for personal injuries against defendant, The Chesapeake & Ohio Railway Company, plaintiff, John De Atley, recovered a verdict and judgment for $9,050. The railroad company appeals.

According to the evidence for plaintiff, he entered defendant's service as brakeman on December 10, 1910. At that time
138 he was 19 years of age. Prior to that time he had made two trips as brakeman between Covington and Russell for the purpose of becoming acquainted with his duties and qualifying himself for the work. At the time of the accident, which occurred on January 22, 1911, he was head brakeman on train No. 95, a fast west-bound manifest freight train. When the train reached Springdale, a point about six miles east of Maysville, the engineer told plaintiff to call the operator and see if he could get an order or the time on train No. 1. Train No. 1 was a fast passenger train from the east. The engineer wanted to know if his train had time to get into Maysville without danger from a collision with No. 1. Plaintiff was unable to understand the operator over the 'phone, and so reported to the engineer. Plaintiff then got into the cab of the engine, and the train proceeded to the coal docks, a point about 460 yards east of F. G. Cabin, where it stopped for coal and water. Plaintiff was then directed by the engineer to go forward to the F. G. Cabin and ascertain from the operator how much time they had on train No. 1. Plaintiff proceeded to the tower, made the inquiry of the operator, and was advised that the train had time to go on to Maysville. After acquiring this information, plaintiff went down to the platform in front of the tower. At that time his train was approaching. When it reach the platform he attempted to
139 board the engine. He caught hold of the grab iron, and put one foot on the step. The speed of the train and his weight threw him loose, and his foot slipped off. The tender ran over his leg and cut it off. He thought that the train was running slow enough for him to get on. He could not judge the speed. The engine did not look to be running very fast. Plaintiff further stated that he had on a number of occasions been directed to walk ahead of his train to a telegraph office for orders, and board the

train as it came by. On cross examination he was unable to name a single place or instance where this had occurred.

For defendant the engineer testified in substance as follows: When the train left Springdale plaintiff went forward to throw the switch on to the main track. Then he requested plaintiff to call up the operator at F. G. Cabin and find out how train No. 1 was running. When the train reached the coal docks, it was stopped for coal and water. He did not at any time direct plaintiff to go to the tower, and did not know that he had gone there. Supposed that plaintiff had gone back to look over the train, as it was his duty to do. When he finished coaling his engine he called in the rear flagman with the usual signal, to-wit: five flasts of the whistle. After waiting a short time, someone about 15 cars back gave him the signal to go ahead.

He then started the train. He supposed the man who had
140 given the signal was De Atley. As a matter of fact, it was the conductor. When he got within about 300 feet of the tower he saw a man standing on the platform. Thought it was the operator with a message to hand to him. He crossed over to the fireman's side of the cab to take the message. When the train reached the platform he recognized De Atley. Just at that moment plaintiff attempted to board the engine. Plaintiff caught hold of the grab iron, his foot slipped and he fell under the wheels. The emergency brakes were at once applied, and the train stopped. The fireman stated that he was in the engine cab all the time after leaving Springdale. Did not hear the engineer direct plaintiff to go to the tower, and did not know that he had gone. After leaving the coal docks, he started firing. Just before the engine reached the tower the engineer called to him to catch a message. He started to lean out the window, and saw plaintiff try to board the train. The conductor says he was in the caboose until the train reached the coal docks. He then started towards the engine, with orders to the effect that train No. 1 was running ten minutes late. Did not reach the engine until after the accident occurred. Knew nothing

in regard to the alleged order given by the engineer to plain-
141 tiff to go to the tower. When about 100 feet from the tower, and before he reached the engine, he saw plaintiff on the platform waiting for the train. The operator at F. G. Cabin stated that plaintiff came into his tower on the occasion in question, and asked: "Have you anything on No. 1?" Witness repeated the question to the dispatcher, who replied: "No. 95 has ten minutes on No. 1. We are expecting her back over here at Maysville." Witness repeated the answer to plaintiff. After remaining there a short time plaintiff left the tower. Saw plaintiff make a leep for the train and fall. He further stated that a "19 order" is executed by the chief dispatcher, and the operator is supposed to hand it on the engine for the engineer and on the caboose for the conductor. The train was running between ten and twelve miles an hour.

By instruction No. 1 the court told the jury in substance that if defendant's engineer directed plaintiff to go to defendant's tower, or knew that plaintiff was at the tower on business connected with the operation of the train, then it was the duty of the defendant, its agents and servants in charge of the train, to exercise ordinary care

to operate the train at such rate of speed as would not make plaintiff's attempt to board the train, under all the facts and cir-
142 cumstances, unusually hazardous, and if they believed that defendant, its agents and servants, negligently failed to perform said duty, and plaintiff was injured by reason of such failure, if any, the jury should find for the plaintiff. By instruction No. 2 the court told the jury that if they believed from the evidence that plaintiff went to the tower of his own volition, and that defendant's engineer did not know of his presence there, they should find for the defendant. Instruction No. 3 fixed the proper measure of damages, and instruction No. 4 presented in proper language the defense of contributory negligence.

The court refused to give the following instruction, offered by the defendant:

"The court instructs the jury that when the plaintiff, John J. De Atley, entered the service of the defendant, railroad company, as brakeman, he assumed all the ordinary risks and hazards of that employment or occupation; and if they should believe from the evidence that the plaintiff's injuries complained of were the natural and direct results of any of said said risks, then they must find for the defendant."

(1) It is first insisted that the evidence fails to show that the speed of the train was the proximate cause of plaintiff's injury. In
143 this connection it is insisted that plaintiff's own evidence discloses the fact that his foot slipped off the step, and he was then thrown loose by his weight and the speed of the train. We think, however, it was for the jury to say whether or not the speed of the train was the cause of plaintiff's injuries; for his foot might not have slipped, or his hold on the grab-iron have been loosened, had it not been for the speed of the train.

(2) The principal error relied on is the failure of the court to give the requested instruction on assumed risk, though this defense was pleaded by the company.

It is conceded that the defendant company was engaged, and plaintiff was employed, in interstate commerce at the time of the injury. Therefore, the Federal Employers' Liability Act controls. The case is not predicated on a violation of any statute enacted by Congress for the safety of employees. That being true, the common law doctrine of assumed risk applies. In the recent case of Seaboard Airline Railway v. Horton, decided April 27, 1914, U. S. Adv. Ops. 1913, p. 635, this precise question was involved. The court, speaking through Mr. Justice Pitney, said:

144 "It seems to us that Sec. 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking Sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employe, there is, with respect

to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible."

The distinction between assumed risk and contributory negligence is not only recognized by the Federal Employers' Liability Act, but by the Federal and other courts of this country. Choctaw, &c. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96; B. & O. Ry. Co. v. Baugh, 149 U. S. 368; St. Louis Cordage Co. v. Miller (C. C. A.) 126 Fed. 495. In brief, the distinction is as follows: Assumption of risk rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk naturally incident to the employment or arising from a particular situation in which the work is done.
145 It negatives the prima facie liability of the master, and does not involve the aggravation or creation of the peril by misconduct of the servant. On the other hand, contributory negligence rests on the breach of duty to exercise ordinary care. It displaces the prima facie liability of the master, adds a new danger to the situation not necessarily incident to the work, and is imposed by law upon the servant, however unwilling or protesting he may be. Though some authorities hold that assumption of risk is not based upon contract, it is generally held to grow out of the contract of employment, and of the application of the maxim volenti non fit injuria. The test of knowledge of danger is not the exercise of ordinary care to discover the danger, but whether the danger was known to or plainly observable by the employee. The test of appreciation of risk is whether the servant understood the risk, or by the exercise of ordinary care ought to have understood it. Rase v. Minneapolis, &c. R. Co., (Minn.) 21 L. R. A. (N. S.) 138, 120 N. W. 360. Notwithstanding this distinction, it is generally held that assumption of risk and contributory negligence frequently approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. Narramore
145½ v. Cleveland, &c. R. Co., 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68. In the case of Seaboard Airline Ry. Co. v. Horton, supra, the difference between assumed risk and contributory negligence is pointed out in the following language:

"The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risks may be present, notwithstanding the exercise of all reasonable care on his part."

The distinction between assumed risk and contributory negligence is of great importance in cases arising under the Federal Employ-

ers' Liability Act; for assumed risk bars a recovery, while contributory negligence merely diminishes the amount of recovery.

The risks which a servant assumes may logically be divided into two classes; (1) those which are not created by the master's negligence, or the ordinary risks of the service; and (2) those
146 which are created by the master's negligence, or the extraordinary risks. Choctaw, O. & G. R. Co., v. Jones, 77 Ark., 367, 4 L. R. A. (N. S.) 837. The ordinary risks are those which are ordinarily and usually incident to the service in which the employee is engaged; thus, the employee assumes the risk of injury from simple tools; a brakeman assumes the risk of injury from the usual and necessary jerks attending the prudent operation of a train; and, unless otherwise provided by statute, he assumes the risk of dangers arising from the negligence of a fellow servant. In addition to these ordinary risks, there are extraordinary risks not contemplated by the terms of the employment, but arising from the negligence of the master. Such risks are not ordinarily assumed by the servant. It is only where he has knowledge, actual or constructive, of the existence of the danger that he can be said to have assumed the risk. Union Pacific Ry. Co. v. O'Brien, 161 U. S. 451. 40 L. Ed. 766; Chicago M. & St. P. Ry. Co. v. Benton, 65 C. C. A. 60, 132 Fed., 460; 1 Labatt Master & Servant, 638. These extraordinary risks usually grow out of a failure on the part of the master to use ordinary care to furnish a servant a reasonably safe place to work or reasonably safe appliances for work. The risk of injury from such unsafe place or such defective appliance the employee does not assume until he becomes aware of the disrepair or of the defect, and of the risk arising therefrom, unless the defect and risks are so obvious that an ordinarily prudent person under the
147 circumstances would have observed and appreciated them. When, however, the employee knows of the defect and appreciates the risk, and continues in the employment without objection or without assurance that the defect will be remedied, he assumes the risk, even though it arise out of the master's breach of duty. Seabo-rd Airline Ry. v. Horton, supra. Viewing the facts of this case in the light of the foregoing principles, it is apparent that the risk was not one of the ordinary and usual risks incident to the employment. It was not shown, nor will we as-ume, that the contract of employment contemplated, or that it was customary, for brakemen to get on trains moving at a dangerous rate of speed. If it be true that the engineer knew of the presence of plaintiff at the tower, and therefore of the necessity of his getting on the train as it passed, it was the duty of the railroad company either to stop the train or to run it at a rate of speed that would have enabled an ordinarily prudent brakeman to get on with reasonable safety. If it failed to do this under the circumstances, it was guilty of negligence. That being true, it follows that if this be a case of assumed risk, it is an extraordinary risk growing out of the master's negligence. The instruction offered by the defendant applies alone to ordinary risks, and does not cover a case of extraordinary risk such as this. Under the practice in the Federal Courts, it is not error

to refuse an instruction to which a party is not entitled, nor
148 is the court bound to modify the offered instruction so as to bring it within the rules of law. Catts v. Phalen, 2 Howard, 382; Buck v. Insurance Co., 1 Peter, 159, 7 L. Ed., 90; Haffin v. Mason, 15 Wall. 671, 82 U. S. 671, 21 L. Ed., 196. But even if it be assumed that the case is one where the trial court should have followed our practice and prepared or directed the preparation of a proper instruction covering the point attempted to be covered by the offered instruction; West Ky. Coal Co., v. Davis, 138 Ky., 667. 128 S. W. 1074; Crane v. Congleton & Bro., 116 S. W. 341; L. & N. R. R. Co., v. Harrod, 115 Ky., 877, 75 S. W. 233; the propriety of the court's action in refusing to do so depends on whether or not the question of assumption of extraordinary risk should have been submitted to the jury. The determination of this question depends on whether or not the speed of the train and the danger of getting on were so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. The only circumstances from which his knowledge and appreciation of the danger can be inferred is the fact that the train was going about 12 miles an hour. On the other hand it appears that plaintiff was only 19 years of age, and had but six or eight trips as brakeman. He had been sent to the tower. While there the train proceeded on its way. His duties required him to be on the passing train. If he failed to get on he would be left be-
hind. He had a right to assume that the engineer would
149 run the train at a speed that would enable him to get on in safety. He was standing facing the train. The train was going directly towards him. As said by this court in M. & B. S. R. R. Co. v. McCabe's A'm'r'x, 30 Ky. L. R. 1009, "it is a matter of common knowledge that one standing immediately in front of a coming train can tell nothing of its rate of speed until it comes quite close." Had the train in this instance been coming at a high rate of speed, doubtless this fact might have been more readily observed. Under such circumstances, however, it is well night impossible to tell the difference between a rate of from four to six miles an hour, when an ordinarily prudent brakeman might get on with reasonable safety, and a rate of from ten to twelve miles an hour, when it would be dangerous for him to do so. Being the head brakeman, plaintiff had the right to get on the engine. He could not tell with any reasonable certainty what the speed of the train was until the engine practically reached him. His opportunity to observe was reduced to the fraction of a second which elapsed between the passing of the front of the engine and the cab, where it was his purpose to get on. In that space of time he had to observe and appreciate the danger, which would have been a practical impossibility in view of his expectation that the train would be going at a reasonable rate of speed, and of his reliance on that fact. The facts present a different case from that of ordinary switching in the
yards. There a brakeman not only has an opportunity to
150 observe the speed of the train, but the train not being about to depart, there is no urgent necessity for his getting on the

train. Here plaintiff was placed in the predicament where he either had to get on the moving train, where his duties required him to be, or be left at a way station; and aside from his own statement, all the circumstances tend to show that knowledge of the speed of the train came to him so suddenly and unexpectedly that he did not have an opportunity to realize and appreciate the danger of getting on. We therefore conclude that the court did not err in refusing to give a corrected instruction embodying the theory of extraordinary assumed risk.

Judgment affirmed. Whole Court sitting. Judge Carroll dissenting.

Dissent by Judge Carroll.

I dissent from this opinion because I think an instruction on the subject of assumed risk should have been given.

Worthington, Cochran & Browning, Maysville, Ky., for appellant.

Allan D. Cole, Maysville, Ky.; Holmes & Ross, Carlisle, Ky., for appellee.

[Endorsed:] J-ne 19, '14. C. & O. v. De Atley.

151 Afterwards, on July 16, 1914, the appellant filed in the Clerk's office of this Court, a petition for rehearing.

And afterwards, at a Court of Appeals, held as aforesaid, on the 21st day of September, 1914, the following order was entered:

C. & O. Ry. Co.
vs.
De Atley.

Mason.

On motion of appellant it is ordered that the petition for rehearing in this case with notice filed in the Clerk's office in vacation be now noted of record and the case is now submitted on this petition.

The petition for rehearing referred to in the foregoing order is as follows:

152 Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
vs.
JOHN J. DE ATLEY, Appellee.

Petition for Rehearing.

May it Please the Court:

The opinion rendered herein, to which this petition for rehearing is directed, is reported in 159 Ky., 687. The grounds upon which a rehearing is asked are as follows:

I.

The main ground relied upon by appellant for a reversal of the judgment appealed from, was the refusal of the trial court
153 to peremptorily instruct the jury to find for appellant (defendant) upon the ground that the appellee's injury was occasioned by a risk which he assumed. In the court's opinion no mention is made of this fact.

II.

In the course of the opinion, in referring to the instruction offered upon assumed risks, it is said:

"The instruction offered by the defendant applies alone to ordinary risks, and does not cover a cause of extraordinary risk such as this. Under the practice in the Federal courts, it is not error to refuse an instruction to which a party is not entitled, nor is the court bound to modify the offered instruction so as to bring it within the rules of law."

It is submitted that the above excerpt from the court's opinion is misleading. In suits under the Federal Act, brought in a state court, the rules of practice adopted in the state courts are controlling. It is only questions of substantive law that are controlled by the decisions of the Federal courts. It is conceded, that, under the state practice, the instruction offered was sufficient to make it incumbent upon the trial court to prepare and give a proper instruction upon the defense of assumed risk, if the evidence justified it. For this reason, we submit that so much of the opinion as is above quoted should be withdrawn.

III.

In assuming as a matter of law that the speed of the train (10 to 12 miles an hour,) created an unusual danger for appellee, we submit that the court invaded the province of the jury. As to whether or not an employe could, or could not, ordinarily
154 board with safety a train moving at that rate of speed, was a question for the jury. Consequently, even under the court's ruling herein, it was for the jury to say whether the risk was an ordi-

nary or an extraordinary one. In short, the court should not have assumed, as it did, that the train was being operated at a negligent rate of speed.

Respectfully submitted.

WORTHINGTON, COCHRAN & BROWNING,
Counsel for Appellant.

155 Afterwards, at a Court of Appeals held as aforesaid, on Sept. 23, 1914, the following order was entered, to-wit:

C. & O. Ry. Co.
v.
De Atley.

Mason.

The Court being sufficiently advised, it is ordered that the petition for rehearing in this case be and the same is now overruled.

Afterwards, to-wit: September 29, 1914, the appellant, filed in the office of the Clerk of the Court of Appeals, the following assignment of errors:

United States of America, *ss:*

In the Supreme Court of the United States.

In the Court of Appeals of Kentucky.

The Chesapeake & Ohio Railway Company (Appellant), Plaintiff in Error,
vs.
John J. De Atley (Appellee), Defendant in Error.

Assignment of Errors by Plaintiff in Error.

Now comes The Chesapeake and Ohio Railway Company, Plaintiff in Error in a writ of error to the Court of Appeals of Kentucky from the Supreme Court of the United States, duly allowed in the above styled cause, wherein the Plaintiff in Error was the appellant in the said Court of Appeals of Kentucky, and the Defendant in Error, the appellee, in the said Court of Appeals of Kentucky, and avers that in the record, proceedings, decision, and judgment in said cause, there is manifest error to its prejudice, and it makes the following assignment of errors therein, to-wit:

First. The said Court of Appeals of Kentucky erred in its construction of the Federal Employers' Liability Act of 1908,
156 in holding that the petition filed in this cause, contained facts or allegations sufficient to authorize a recovery in favor of Defendant in Error, as said petition and amendment simply plead legal conclusions, without any issue of fact being tendered or pleaded.

Second. That said Court of Appeals erred as shown by the undisputed facts in the record, in holding that there was any legal evi-

dence offered at the trial of this cause in the Circuit Court of Mason County, either proving or tending to prove that Plaintiff in Error, or any of its agents, servants or employes, were guilty of any negligence whatever at the time the Defendant in Error was injured.

Third. That said Court of Appeals erred in holding that there was any legal evidence introduced upon the trial of the cause proving, or tending to prove, any negligence upon the part of the employes of Plaintiff in error in charge of the train which ran over the Defendant in Error.

Fourth. That the said Court of Appeals erred in holding that there was any evidence introduced upon the trial of the cause which authorized or tended to support a recovery against the Plaintiff in Error under the provisions of the Federal Employers' Liability Act of 1908.

Fifth. That the said Court of Appeals erred in refusing to hold that, on the undisputed facts disclosed by the record the Defendant in Error was injured by reason of his own voluntary acts and conduct, without any reference to the alleged wrongful and negligent acts of Plaintiff in Error, or its servants or employes;

Sixth. That the said Court of Appeals erred in holding that there was any legal evidence introduced upon the trial of this cause which proved or tended to prove that there was any negligence in
157 the operation of the train which ran over Defendant in Error, or upon the part of the employes in charge of said train, which operated as a proximate cause of injury to Defendant in Error.

Seventh. That the said Court of Appeals erred in refusing to hold that the injury to the Defendant in Error was, under the undisputed facts disclosed by the evidence, the result of a risk assumed by him.

Eighth. That the said Court of Appeals erred in holding that there was no evidence authorizing the submission to the jury of the question as to whether or not the injury to the Defendant in Error was the result of a risk assumed by him.

Ninth. That the said Court of Appeals erred in holding that the Mason Circuit Court properly refused to give to the jury instruction "H" offered by Plaintiff in Error which said instruction is as follows:

The Court instructs the jury that when the plaintiff, John J. De Atley, entered the service of the defendant, Railroad Company, as brakeman, he assumed all the ordinary risks and hazards of that employment or occupation; and if they should believe from the evidence that the plaintiff's injuries complained of were the natural and direct results of any of said risks or hazards, then they must find for the defendant.

Tenth. That the said Court of Appeals of Kentucky erred in holding that, on the undisputed facts disclosed by the record there was no evidence introduced upon the trial of this cause that proved, or even tended to prove that the speed of said train and the risk of injury from an attempt to board same, was known to Defendant in Error, or was so open and obvious that an ordinary prudent person should have known and appreciated them; and in refusing to hold that the jury should have been instructed upon this phase of the case.

Eleventh. That the said Court of Appeals erred in refusing to hold that, under the undisputed facts as disclosed by the record,
158 the speed of said train, and the danger of attempting to board same, was known to Defendant in Error, or was so open and obvious to him that he should have known thereof.

Twelfth. That the said Court of Appeals erred in refusing to hold that, under the undisputed facts as disclosed by the record the Defendant in Error was guilty of contributory negligence per se; and in refusing to hold that the Mason Circuit Court erred in not instructing the jury, under the provisions of the Federal Employers' Liability Act of 1908, that the damages sustained by the Defendant in Error, were required to be diminished on account of, and in proportion to, said contributory negligence, in accordance with Instruction "G" offered by Plaintiff in Error, which said instruction is as follows:

The Court instructs you that in the event you find the defendant negligent under Instruction No. — then you must also take into consideration the question of the plaintiff's negligence. The Court instructs you that the plaintiff, in attempting to board the train in question, was himself negligent and that even though you find the defendant negligent under Instruction No. 1, yet because of plaintiff's own negligence he is not entitled to recover the full damages sustained by him as a result of the accident and injury to him, but only to such proportional amount as the negligence, if any, of the Railroad Company bears to the entire negligence of both. Therefore, even though you find for plaintiff under Instruction No. 1, you will diminish the damages awarded to him in proportion to the amount of plaintiff's own negligence.

For the foregoing prejudicial errors and each of them affecting the merits of this cause, the Plaintiff in Error prays a reversal of the judgment of the said Circuit Court of Mason County Kentucky and the judgment of affirmance thereto by the Court of Appeals of Kentucky.

And the said, The Chesapeake and Ohio Railway Company, as Plaintiff in Error, prays that the judgment aforesaid for each of the errors aforesaid and for other errors in the record and proceedings in said cause whereby the said Plaintiff in Error has been by said judgment deprived of its rights, privileges and im-
159 munities and for each of the errors and matters above assigned, be reversed, annulled and held for naught; and that said Plaintiff in Error may be restored to all things which it has lost by reason of said judgment of the said Circuit Court of Mason County, Kentucky and by the affirmance thereof *of* by the said Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff in Error,
By WORTHINGTON, COCHRAN & BROWNING, *Its Attorneys.*

Filed Sept. 29, 1914.
ROBT. L. GREENE, *C. C. A.*

160 At the same time, towit: Sept. 29, 1914, the appellant filed in said Clerk's office, its petition for Writ of Error, the order allowing same and the Writ of Error with endorsement thereon, which are returned herewith as parts of this transcript.

161 Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
vs.
JOHN J. DE ATLEY, Appellees.

Petition for Writ of Error.

To the Honorable the Judges of the Supreme Court of the United States, or to any of the Associate Judges thereof, or to the Chief Justice of the Court of Appeals of Kentucky:

Now comes The Chesapeake and Ohio Railway Company, the above named appellant, by its attorneys, and complains;

That in the record and proceedings had in said cause of The Chesapeake and Ohio Railway Company, appellant, against John J. De Atley, appellee, No. —, and in the final judgment therein affirming the judgment of the Circuit Court of Mason County, in the State of Kentucky, and also in the rendition of the judgment in the above entitled cause in the said Circuit Court of Mason County, manifest error has happened to the great damage of the said The Chesapeake and Ohio Railway Company, the defendant in the said Circuit Court of Mason County and appellant in the Court of Appeals of Kentucky; that said error in the judgments of each and both of said courts consisted in the denial of rights and immunities expressly claimed by the appellant under the Federal Employers' Liability Act of 1908 (35 U. S. Stat. at L., p. 65, Chapter 149), and in the affirmance of alleged rights and immunities claimed by the appellee under said Act, which said alleged rights
162 and immunities were controverted by appellant; that under and by virtue of the record and proceedings in each of said courts, the proper construction of said Federal Act was involved and the right of appellee to recover in said cause was based solely upon the said Federal Act aforesaid; that the judgment of the said Circuit Court of Mason County and the judgment and order affirming same of the Court of Appeals of Kentucky were based solely upon said Federal Act aforesaid, and said Act was construed by each of said courts adversely to the contention of appellant, and to the denial of rights and immunities claimed by appellant under said act, all of which will more in detail appear from the assignment of errors which is filed with this petition; that the said Court of Appeals of Kentucky, in whose record and judgment the aforesaid errors appear, is the highest court of law or equity in the State of Kentucky in which a decision can be had in said suit between the parties thereto, aforesaid.

Wherefore, the said, The Chesapeake and Ohio Railway Com-

pany, appellant, by its attorneys, prays for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky; that citation be granted and signed; that the bond herewith presented be approved and that said bond and writ of error may operate as a supersedeas; that the record in said matter may be removed into the Supreme Court of the United States, to the end that the errors complained of by the petitioner may be examined and corrected by the said Supreme Court of the United States of America.

Dated this 29th day of September, 1914.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By WORTHINGTON, COCHRAN & BROWNING, *Its Attorneys.*

Filed Sep. 29, 1914.
ROBT. L. GREENE, *C. C. A.*

163 The Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellants,
vs.
JOHN J. DE ATLEY, Appellee.

Order on Petition for Writ of Error.

Now, on this 29 day of September, 1914, there is presented to the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky, in Chambers, a petition for a writ of error to the Supreme Court of the United States, a writ of error to the Supreme Court of the United States, a citation directed to said appellee, said John J. De Atley, citing and admonishing him to appear in the Supreme Court of the United States of America not exceeding thirty days from and after the day said citation bears date, and an assignment of errors; which said petition for a writ of error is allowed, said citation signed, said assignment of errors filed, and an order of said Chief Justice filed approving the writ of error bond in the sum of twenty thousand dollars which said bond is also filed and which is to operate as a supersedeas.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

Filed Sep. 29, 1914.
ROBT. L. GREENE, *C. C. A.*

164 In the Supreme Court of the United States.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN J. DE ATLEY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and pleadings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of Kentucky before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between The Chesapeake and Ohio Railway Company, Appellant, and John J. De Atley, Appellee, wherein was drawn in question the construction of a Statute of the United States, to-wit, the Employers' Liability Act of 1908 (35 U. S. Stat. at L., p. 65, Chapter 149), as applicable to and bearing upon an assessment of damages against the said The Chesapeake and Ohio Railway Company, for injuries occurring to John J. De Atley near Maysville, Ky., on the 22nd day of January, 1911, and the decision was against the rights, privileges and exemptions specifically set up and claimed by Plaintiff in Error under the Statute aforesaid, a manifest error hath happened to the great damage of said Chesapeake and Ohio Railway Company, Plaintiff in Error, as by its complaint appears, we being willing that error
165 if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, directly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at the City of Washington in the District of Columbia thirty days after the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 29th day of September, in the year of our Lord 1914, and of the Independence of United States of America, the one hundred and thirty-eighth.

[Seal Eastern K't'y Dist. Court, United States of America.]

J. W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky, at Frankfort.

Allowed the 29 day of September, 1914, by
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

Filed Sep. 29, 1914.
ROBT. L. GREENE, *C. C. A.*

166 The said appellant by its counsel also filed in said Clerk's office the Writ of Error Bond which is in words and figures following, to-wit:

167 The Supreme Court of the United States.

The Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (Appellant), Plaintiff in Error,
vs.
JOHN J. DE ATLEY (Appellee), Defendant in Error.

Writ of Error Bond.

Know all men by these presents: That The Chesapeake and Ohio Railway Company, as principal, and the National Surety Company, as surety, are held and firmly bound unto John J. De Atley in the sum of Twenty Thousand ($20,000.00) Dollars to be paid to the said John J. De Atley, his successors, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this 5th day of October, 1914.

Whereas the above named Plaintiff in Error hath prosecuted a writ of error in the Supreme Court of the United States of America to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

168 Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all costs and damages if he should fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By W. D. COCHRAN, *Att'y.*
NATIONAL SURETY COMPANY,
By LE WRIGHT BROWNING, *Att'y.*

I hereby approve the foregoing bond and sureties this 5th day of October, 1914.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

169 Know all men by these presents, that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed, and does by these presents, make, constitute and appoint Lewright Browning, of Maysville and State of Kentucky its true and lawful Attorney, with full power and authority hereby conferred in its name, place and stead, to sign, execute and acknowledge as surety a certain bond in penalty not exceeding twenty thousand ($20,000) dollars, on behalf of the Chesapeake & Ohio Railway Company, conditioned for appeal pursuant to the Laws of the State of Kentucky and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the Second day of February, 1909.

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section 1. The President, First Vice-President or any other Vice-President may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact to represent and act for and on behalf of the Company, and either the President, First Vice-President, or any other Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given him.

"Section 4. Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for and in the name and on behalf of the Company, any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature of a bond, recognizance or conditional undertaking, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary."

170 And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D. 1912, a quorum being present, the following additional section to the foregoing By-Law was adopted:

"Section 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, policies of insurance and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any By-Law contained in Articles VI, XII and XIII of the By-Laws of the Company."

In witness whereof, the National Surety Company, has caused these presents to be signed by its Vice-President and its corporate

seal to be hereto affixed, duly attested by its Assistant Secretary, this 3rd day of October, A. D. 1914.

[SEAL.] NATIONAL SURETY COMPANY,
By W. C. ARMITAGE, *Vice-President.*

Attest:
J. R. WELLS,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of October, A. D. 1914, before me personally came W. C. Armitage, to me known, who being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] H. E. EMMETT,
Notary Public for Kings County No. 3.

Certificate filed in New York County, No. 2, Nassau, Bronx, Queens, Richmond and Westchester counties, Kings County Register's office No. 6002. New York County Register's Office No. 6017. Bronx County Register's office No. 603.

171 In the Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
vs.
JOHN J. DE ATLEY, Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To John J. De Atley, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of Kentucky, wherein The Chesapeake and Ohio Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky this 29th day of September, 1914.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

We hereby acknowledge due service of the foregoing citation this 3rd day of Oct., 1914.

A. D. COLE,
Attorneys for Defendant in Error.

172 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

I, Robert L. Greene, Clerk of the Court of Appeals of Kentucky, in obedience to the Writ of Error herein, hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record with all things touching the same, in the case of The Chesapeake & Ohio Railway Company, appellant, against John J. De Atley, appellee, as the same appears of record and on file in my office, except the briefs filed by the parties.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of my office, Done at the Capitol at Frankfort, Kentucky, this 8th day of October, A. D. 1914.

[Seal Kentucky Court of Appeals.]

ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky.

Fee for this Transcript $52.00.

173 Supreme Court of the United States.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
v.
JOHN J. DE ATLEY, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Now comes plaintiff in error, The Chesapeake & Ohio Railway Company, and filed with the Clerk of this court a statement of the errors on which it intends to rely, which are the same as those copied in the record herein, pages 155-156 157 and 158 thereof, and are as follows:

First. The said Court of Appeals of Kentucky erred in its construction of the Federal Employers' Liability Act of 1908, in holding that the petition filed in this cause, contained facts or allegations sufficient to authorize a recovery in favor of defendant in error, as said petition and amendment simply plead legal conclusions, without any issue of fact being tendered or pleaded.

Second. That said Court of Appeals erred as shown by the undisputed facts in the record, in holding that there was any legal evi-

dence offered at the trial of this cause in the Circuit Court of Mason County, either proving or tending to prove that plaintiff in error, or any of its agents, servants or employes, were guilty of any negligence whatever at the time the defendant in error was injured.

Third. That said Court of Appeals erred in holding that there was any legal evidence introduced upon the trial of the cause proving, or tending to prove, any negligence upon the part of the employes of plaintiff in error in charge of the train which ran over the defendant in error.

Fourth. That the said Court of Appeals erred in holding
174 that there was any evidence introduced upon the trial of the cause which authorized or tended to support a recovery against the plaintiff in error under the provisions of the Federal Employers' Liability Act of 1908.

Fifth. That the said Court of Appeals erred in refusing to hold that, on the undisputed facts disclosed by the record the defendant in error was injured by reason of his own voluntary acts and conduct, without any reference to the alleged wrongful and negligent acts of plaintiff in error, or its servants or employes:

Sixth. That the said Court of Appeals erred in holding that there was any legal evidence introduced upon the trial of this cause which proved or tended to prove that there was any negligence in the operation of the train, which ran over defendant in error, or upon the part of the employes in charge of said train, which operated as a proximate cause of injury to defendant in error.

Seventh. That the said Court of Appeals erred in refusing to hold that the injury to the defendant in error was, under the undisputed facts disclosed by the evidence, the result of a risk assumed by him.

Eighth. That the said Court of Appeals erred in holding that there was no evidence authorizing the submission to the jury of the question as to whether or not the injury to the defendant in error was the result of a risk assumed by him.

Ninth. That the said Court of Appeals erred in holding that the Mason Circuit Court properly refused to give to the jury instruction "H" offered by plaintiff in error which said instruction is as follows:

The court instructs the jury that when the plaintiff, John J. De Atley, entered the service of the defendant, Railroad Company, as brakeman, he assumed all the ordinary risks and hazards of that employment or occupation; and if they should believe from the evidence that the plaintiff's injuries complained of were the natural and direct results of any of said risks or hazards, then they must find for the defendant.

Tenth. That the said Court of Appeals of Kentucky erred in holding that, on the undisputed facts disclosed by the record there was no evidence introduced upon the trial of this cause that proved, or even tended to prove that the speed of said train and the risk of injury from an attempt to board same, was known to Defendant in error, or was so open and obvious that an ordinarily prudent person should have known and appreciated them; and in refusing to hold that the jury should have been instructed upon this phase of the case.

175 Eleventh. That the said Court of Appeals erred in refusing to hold that, under the undisputed facts as disclosed by the record, the speed of said train and the danger of attempting to board same, was known to defendant in error, or was so open and obvious to him that he should have known thereof.

Twelfth. That the said Court of Appeals erred in refusing to hold that, under the undisputed facts as disclosed by the record the defendant in error was guilty of contributory negligence per se; and in refusing to hold that the Mason Circuit Court erred in not instructing the jury, under the provisions of the Federal Employers' Liability Act of 1908, that the damages sustained by the defendant in error, were required to be diminished on account of, and in proportion to, said contributory negligence, in accordance with Instruction "G" offered by plaintiff in error, which said instruction is as follows:

The Court instructs you that in the event you find the defendant negligent under Instruction No. — then you must also take into consideration the question of the plaintiff's negligence. The court instructs you that the plaintiff, in attempting to board the train in question, was himself negligent and that even though you find the defendant negligent under Instruction No. 1, yet because of plaintiff's own negligence he is not entitled to recover the full damages sustained by him as a result of the accident and injury to him, but only to such proportional amount as the negligence, if any, of the Railroad Company bears to the entire negligence of both. Therefore, even though you find for plaintiff under Instruction No. 1, you will diminish the damages awarded to him in proportion to the amount of plaintiff's own negligence.

Plaintiff in error states that it thinks that this entire record, excepting the proceedings relative to the first appeal taken in this cause to the Court of Appeals of Kentucky, from the judgment of the Mason Circuit Court, ordering the removal of this cause to the United States District Court for the Eastern District of Kentucky, being that part of the record commencing on page 1, and extending to and including a part of page 39, ending with the words "On the 10th day of May, 1912, the mandate of this court issued to the Mason Circuit Court", should be printed for the consideration of the errors above relied on. The parts thereof which plaintiff in error designates as necessary to be printed commence on page 39 of the record with the words "Be it remembered that afterwards, to wit, on March 18, 1914, appellant, The Chesapeake & Ohio Railway Company, by its counsel, filed in the Clerk's office of the Court of Appeals
176 of Kentucky a transcript of the record, in words and figures following, to-wit", down to and including the certificate of the Clerk of the Court of Appeals, on page 172.

E. L. WORTHINGTON,
W. D. COCHRAN,
LE WRIGHT BROWNING,
Counsel for Plaintiff in Error.

177 The defendant in error, John J. De Atley, by his counsel, Allan D. Cole, hereby accepts service of the above, and agrees that the portions of the record above referred to are all those necessary to be printed for the consideration of the errors relied on.

ALLAN D. COLE,
Counsel for Defendant in Error.

178 [Endorsed:] File No. 24,419. Supreme Court U. S., October term, 1914. Term No. 675. The Chesapeake & Ohio Railway Company, Pl'ff in Error, vs. John J. De Atley. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and consent of counsel for defend- in error thereto. Filed October 30, 1914.

Endorsed on cover: File No. 24,419. Kentucky Court of Appeals. Term No. 274. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. John J. De Atley. Filed October 30th, 1914. File No. 24,419.

Supreme Court of the United States.

OCTOBER TERM, 1915

No. 274

The Chesapeake and Ohio Railway Company, ... *Plaintiff in Error,*

v.

John J. DeAtley, ... *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PLAINTIFF IN ERROR.

E. L. WORTHINGTON,
W. D. COCHRAN,
LEWRIGHT BROWNING,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

The Chesapeake and Ohio Railway Company, ... ***Plaintiff in Error.***

v.

John J. DeAtley, ... ***Defendant in Error.***

May It Please the Court:

STATEMENT OF FACTS.

This is a writ of error to a judgment of the Court of Appeals of the state of Kentucky, affirming a judgment of the Circuit Court of Mason County, Kentucky, in favor of the defendant in error (plaintiff) against the plaintiff in error (defendant) for the sum of $9,050.00, for damages alleged to have been sustained by the plaintiff as the result of injuries received by him while in the defendant's employment. (See *Ches. & Ohio Ry. Co.* v. *DeAtley, 159 Ky., 687, 167 S. W., 933.*)

The facts of the case are as follows: According to the evidence of the plaintiff, he entered defendant's service as a brakeman on the 10th day of December, 1910. At that time he was nineteen years of age. Prior to his employment he had made two round trips from Covington, Ky., to Russell, Ky., for the purpose of becoming acquainted with his duties as a brakeman. Between December 10th, 1910, and January 22.

1911, plaintiff worked regularly as a brakeman, making the usual runs between Russell and Covington. Before entering defendant's service as a brakeman, he had also worked in the repair department of the railway company in its Covington yards. At the time of the accident, which occurred on January 22, 1912, he was head brakeman on train No. 95, a fast west-bound manifest freight train. When the train reached a station called Springdale, a point about six miles east of Maysville, the engineer directed plaintiff to go to a nearby railway telephone and to call up the operator and ascertain the whereabouts of train No. 1, which was a fast west-bound passenger train. Plaintiff was unable to understand the operator and so reported to the engineer. He then got into the cab of the engine and the train proceeded to the coal docks, which is about a mile east of Maysville, and also about 460 yards east of a telegraph station, known as the F. G. Cabin, where it stopped for coal and water. Plaintiff was then directed by the engineer to go forward to F. G. Cabin and ascertain from the operator what time they had on train No. 1. He proceeded to the telegraph office and was advised that his train had time to go on to Maysville. He then went to the platform in front of the office. At that time his train was approaching. When it reached the platform, he attempted to board the engine, and in so doing, slipped and fell beneath the wheels of the tender, his leg being run over and cut off.

On behalf of the defendant, the engineer testified in substance, that while the train was at Springdale, he requested the plaintiff to call up the operator at F. G. Cabin and find out how train No. 1 was running. When the train reached the coal docks, it was stopped for coal and water. He did not at any time direct plaintiff to go to the tower, or telegraph

office, at F. G. Cabin, and did not know that he had gone; he supposed that plaintiff had gone back to look over the train, as it was his duty to do. When he finished coaling his engine, he gave the usual signal by whistle of his readiness to proceed, and a few moments later, some one about 15 cars back, whom he thought was the plaintiff, but was really the conductor, gave the signal to go ahead. When the engine got within about 300 feet of F. G. Cabin, he saw a man standing on the platform, and thought it was the operator with a message to hand on to him. He then crossed over to the fireman's side of the cab to take the message. When the train reached the platform he recognized the plaintiff, and just at that moment the latter attempted to board the engine, but after catching hold of the grab iron, he slipped and fell under the wheels. At the time of the accident the train was running about 12 miles per hour. The fireman stated that he was in the engine cab and did not hear the engineer give any direction to the plaintiff to go forward to F. G. Cabin, nor did he know that plaintiff had gone there. The conductor was in the caboose until the train reached the coal docks, and he then started walking over the train toward the engine, but did not get there until after the accident. He did not know plaintiff had gone ahead to F. G. Cabin, until he got within about 100 feet of the platform and saw plaintiff waiting for the train. The foregoing are the material facts of the case, as developed by the testimony of the various witnesses.

The suit was brought under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, Com. Stat. 1913, Section 8657).

As above stated, the plaintiff recovered a judgment in the trial court for the sum of $9,050.00, which judgment was af-

firmed by the Kentucky Court of Appeals in an opinion which may be found on page 58, et seq., Record.

The errors relied upon for a reversal of the aforesaid judgment are as follows:

First, that the Court of Appeals of Kentucky erred in holding that there was any evidence introduced at the trial of the case in the Mason Circuit Court which proved, or tended to prove, that the defendant, or any of its employees, were guilty of any negligence which contributed to, or caused, the accident and injury to the plaintiff;

Second, that the Court of Appeals of Kentucky erred in refusing to hold that the injury to the plaintiff was the result of a risk assumed by him;

Third, that the said Court of Appeals erred in holding that there was no evidence introduced authorizing the submission to the jury of the question as to whether or not the injury to the plaintiff was the result of a risk assumed by him;

Fourth, that the said Court of Appeals erred in refusing to hold that the plaintiff was negligent *per se,* and in refusing to hold that the Mason Circuit Court erred in not instructing the jury that the damages sustained by plaintiff were required to be diminished in proportion to the plaintiff's said negligence.

ARGUMENT

I.

In submitting the case to the jury, the Mason Circuit Court made the liability of the defendant dependent upon whether or not the engineer, with knowledge of the plaintiff's presence at the telegraph tower, operated the train past that

point at such a rate of speed as to make the plaintiff's attempt to board the train, unusually hazardous. The Kentucky Court of Appeals also found that this was the only theory upon which negligence upon the part of the defendant could be predicated.

But even if it should be conceded, *ad arguendo*, that defendant's engineer was negligent in the above respect, yet it is manifest that plaintiff can not recover unless such negligence was the proximate cause of the accident and injury to him. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter, 229 U. S., 265, 57 L. Ed., 1179.*

It was, and is, the defendant's contention that there is no evidence in the record which shows, or tends to show, that the speed of the train was the cause of the plaintiff's injuries. Plaintiff's own testimony fails to establish any proximate connection between the accident to him and the alleged negligent operation of the train. His testimony as to how the accident occurred is as follows (see page 12, Record):

"Q. 46. Tell the jury what kind of a morning or day it was.

A. It had been snowing and sleeting for two or three days and was still snowing; it had been snowing that night and the next morning it was sleeting and a very cold slick morning.

"Q. 47. As the train approached you, did you or not, think you could get aboard safely?

"A. Yes sir, I did.

"Q. 48. Did you, or not, realize at what rate of speed it was running?

"A. No, sir, I thought it was running slow enough to board the train all right.

"Q. 49. What portion of the train did you undertake or attempt to board?

"A. The engine.

"Q. 50. Tell the jury in your own way how you proceeded to do that and what followed?

"A. What was the question?

"Q. 51. I asked you how you proceeded to get aboard this train, what you did in order to do so, and then what happened?

"A. I went down on the platform as the engine pulled up and *I got the grab iron and put one foot on the step,— I think one foot hit the step and then slipped off* and the speed of the train and my weight, I suppose, threw me loose."

Also on cross examination, it was shown that on a previous trial of a suit by plaintiff's father to recover for loss of services, the plaintiff made the following statement: "I walked out to catch it and missed my footing." (See question 93, page 19, Record.)

The engineer made the following statement as to how the accident occurred: "He got hold, I think, of the grab iron and, I supposed, he must have slipped." (See question 43 page 24, Record.)

The foregoing is all the testimony that was introduced as to how the accident occurred. It is apparent that the plaintiff's fall was the result of the slipping of his foot, after he had caught hold of the grab iron and placed his foot on the step. The plaintiff himself does not say what caused his foot to slip, nor does he even intimate that it was the result of the speed of the train. The Kentucky Court of Appeals, in holding that this question of proximate cause was a question for the jury, said:

> "We think, however, it was for the jury to say whether or not the speed of the train was the cause of plaintiff's injuries; for his foot might not have slipped, or his hold on the grab iron have been loosened, had it not been for the speed of the train."

To so hold, is merely to permit a jury to speculate upon a question as to which there is no evidence. The plaintiff himself states that his fall was caused by his foot slipping off of the step; he, better than any one else, knew what caused his foot to slip, and his failure to attribute it to the speed of the train furnished the best evidence that it was not so caused. It is just as reasonable to presume that it was caused by the icy and slippery condition of the platform or steps as that it was the result of the speed of the train.

In *Paxton* v. *Texas & Pac. Ry. Co., 179 U. S., 658, 45 L. Ed., 361,* it was said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

See also *4 Labatt on Master & Servant, Sec. 1604,* and authorities therein cited.

II.

It is further submitted that plaintiff, as a matter of law, assumed the risk of injury from his attempt to board defendant's train.

As the Kentucky Court of Appeals points out in its opinion delivered herein, the risks which a servant may assume are logically to be divided into two classes: *first*, those which are not created by the master's negligence, or the ordinary risks of the service; and, *second*, those which are created by the master's negligence, commonly called *extraordinary* risks.

The ordinary risks are those which are ordinarily incident to the business, and all such risks are assumed by the servant as and for a part of the terms of his employment.

Extraordinary risks are those which arise from the negligence of the master in the conduct of his business. Such risks are not assumed by the servant unless the risk and danger therefrom is known to the employee, or is so plainly observable that the employee is presumed to know thereof. Some authorities rest the rule of assumption of extraordinary risks of which the servant has actual or constructive knowledge upon the maxim "volenti non fit injuria;" others, as for instance Labatt, in his work on Master and Servant, Section 1168, adopt the theory that "the increased danger caused by the master's negligence, becomes, when it is known, one of the ordinary incidents of the service, so far as the servant is concerned." And in the following section (1168a) of the same work, the whole doctrine of assumption of risks is stated as follows:

> "In Section 1164 it is stated that for the purposes of the commentator it is more convenient to divide the risks

to which the servant may be subjected while in his employment into two classes,—the ordinary risks and the extraordinary risks. There is also a strong logical reason for this, namely: If the servant is injured by an ordinary risk of the service, the master is not prima facie liable, and need not resort to any of the subsidiary elements of the law of master and servant, such as assumption of risk, contributory negligence, or the fellow-servant rule, to prevent a recovery; while if the servant is injured by an extraordinary risk, the master is prima facie liable, and, to prevent recovery, must resort to one of the defenses noted. Thus it will be seen that when the phrase 'assumption of risk' is used with reference to the ordinary risks of the service, it does not express an independent rule of law, but is merely a mode of expression extensively used to express that very vital principle of the law of master and servant that the master is not liable where he has not been at fault.

"In respect to assumption of risk as embracing the risks due to the master's intelligence, it is very frequently stated that the servant never assumes the risk of the master's negligence. In some cases this statement is supplemented by the qualification that the servant does not assume the risk of the master's negligence except where, with knowledge of such negligence, he voluntarily remains in the employment. It should be borne in mind that, with the exception of Missouri and North Carolina, the exception is as broad as the rule, and that whenever such a statement is made and the rule apparently applied by the court it is in a case where the servant was not aware of the negligence, or at least did not appreciate the danger.

"The rule as to assumption of risk may be briefly expressed as follows: The servant assumes all the ordinary risks—i. e., those due to the master's negligence—of which he knows and the dangers of which he appreciates.

Stated in this form the rule is followed in the absence of statute, in all jurisdictions except Missouri and North Carolina. But even in this form it must be borne in mind that as a vital principle of the law of master and servant and the doctrine of assumption of risk operates only in case the master has been negligent. In such a case it operates to release him from the consequences of his negligence. If the master has not been negligent, the phrase 'assumption of risk,' as was stated above, is used merely to connote the general rule that the master is not liable for injuries which are not due to fault on his part. These principles are emphasized in a number of recent cases."

In accord with the above are the following decisions of this court: *Seaboard Air Line Ry. Co.* v. *Horton*, *233 U. S., 492, 58 L. Ed., 1062; Schlemmer* v. *Buffalo R. & P. Ry. Co., 220 U. S., 590, 55 L. Ed., 596; Choctaw, O. & G. Ry. Co.* v. *McDade, 191 U. S., 64, 48 L. Ed., 96; Texas & P. R. Co.* v. *Harvey, 228 U. S., 319, 57 L. Ed., 852; Gila Valley, G. & N. R. Co.* v. *Hall, 232 U. S., 94, 58 L. Ed., 521;* and other cases therein cited.

It is now well established that in actions under the Employers' Liability Act, the defense of assumed risks is available to the employer to the full extent allowed at common law, except to the extent that such defense is eliminated by Section 4 of said Act. See *Seaboard Air Line Ry. Co.* v. *Horton*, supra.

So much for the general principles governing the defense of assumed risks in suits such as this. We come now to the question of the applicability of that defense to the facts proven in the case at bar. As before stated, the plaintiff and the Ken-

tucky courts rested the plaintiff's right of recovery upon the theory that, assuming that the engineer knew of plaintiff's intention to board the train, it was operated at a rate of speed which made plaintiff's attempt to board same unusually and unnecessarily dangerous. Of course, if the speed of the train was not such as to make an attempt to board it unusually hazardous, then the risk of injury from such an attempt was an ordinary risk of the business, which is but another way of saying that the master was not negligent. This phase of the case will be noticed later at more length.

But even if it be assumed that the train was operated at a negligent rate of speed, yet it is submitted that plaintiff in attempting to board the train, assumed the risk of injury from such attempt. The question as to whether or not the servant has assumed the risk of injury from a defect or danger created by the master's negligence is always dependent upon the existence of knowledge, actual or constructive, upon the part of the servant of the defect, or danger, and the risk therefrom. The rule is stated in *Seaboard Air Line Ry. Co.* v. *Horton*, supra, as follows:

> "But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

In the case at bar, the defect or danger (these terms being interchangable) was the speed at which the train was being operated; the risk was the possibility of injury from

an unsuccessful attempt to board the train. If knowledge of the danger and appreciation of the risk are under the circumstances of the case, to be attributed to plaintiff, then he must be deemed to have assumed the risk of injury; otherwise not.

In its opinion delivered herein, the Kentucky Court of Appeals practically bases its refusal to recognize the defense under consideration, upon the ground that plaintiff did not realize and appreciate the danger of attempting to get on the train. It is true that the plaintiff states that he did not know how fast the train was running. But one can not close his eyes to an approaching danger, and then declare that he did not know of, or appreciate such danger, for, as stated in the *Horton* case, where the defect and risk are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, then the existence of such knowledge and appreciation will be presumed. It is difficult for us to conceive of a more obvious danger or risk than in the case presented herein. From the time plaintiff left the train at the coal docks until he made his unsuccessful attempt to board same, he necessarily knew that he would be compelled to board the train while it was moving. While he was in the telegraph tower his attention was directed to the approaching train, and he was told that if he wanted to get on it he had better go up the track. (See question 10, page 50, Record.) During this time the approaching train was necessarily in full view of him, and the operator's advice was at least an indirect warning as to the speed of the train. When he reached the platform, the train was still some distance away (according to the engineer's estimate, about 300 feet distant), and he had ample opportunity to gauge the train's speed and to understand and appreciate the risk attendant upon an attempt to board

same. With the whole situation plainly before him, it is difficult to understand upon what hypothesis the Kentucky court based the statement that "his opportunity to observe was reduced to the fraction of a second."

The true test as to a servant's right to recover in cases such as this, is whether he ought to have known and comprehended the danger in question, and not whether he did in fact know and comprehend it. Nor is a servant's denial of the possession of knowledge or comprehension of the danger conclusive of the question, for "if the courts were always to decline to interfere with the verdict of a jury in cases in which the servant thus testified in his own favor, their controlling functions would, for practicable purposes, be confined within very narrow limits. There are, it may be supposed, very few trials in which the servant does not swear that the risk was unknown to him." (*4 Labatt on Master & Servant, Section 1309.*) "The juridical theory of imputed knowledge, which is applied in actions by a servant against his employer, is simply this: That he is or is not chargeable with a comprehension of the conditions which caused his injury, and of the risks created by these conditions, according as it may reasonably be inferred that these conditions or those risks would, or would not, have been comprehended by a person of ordinary prudence, whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same as those of the servant himself." (*4 Labatt on Master & Servant, Sec. 1310.*)

The plaintiff had not been told that the train would be operated past the tower at any particular rate of speed; he was not, therefore, lulled into a sense of security, by any assur-

ance that the speed would be limited to 2, 3 or 4 miles per hour; he necessarily knew that he, himself, would have to determine whether the rate of speed was such as would permit him to make the attempt to board the train in reasonable safety. Neither will it do to say that the difficulty of judging a train's speed eliminates the assumption of the risk. One may not be able to estimate even approximately the actual speed of a passing train, but the veriest tyro can tell at a glance whether the speed is such as will render an attempt to get aboard unusually dangerous or hazardous.

It is earnestly submitted that no danger connected with industrial life is more plain, more readily observable, or more commonly experienced and seen, than the danger attendant upon an attempt to board a moving car. While the imminency or certainty of injury may, and does, vary in each particular case, according to the speed of the train, yet in all such cases the nature of the risk is the same, and the question of the assumption or non-assumption of any particular risk is in every case dependent upon the nature of the risk, and not upon the imminency or uncertainty of injury. It is submitted that so far as the question of assumed risks is concerned (disregarding the entirely separate question of contributory neglect) it makes no difference whether the train is being operated at one mile per hour, or at fifty miles per hour. If it is a slow moving train, the risk is an ordinary one, incidental to the business of railroading; if it is a fast moving train, the risk is open, obvious and apparent. So, the question presented here is not as to the weight of evidence, or the effect of conflicting testimony, but a clear cut legal proposition, to-wit, whether or not under the Federal act, an employee assumes the risk of an attempt to board a moving train.

Necessarily, the determination of the question as to whether knowledge and appreciation of any particular risk are to be imputed to the servant, must, to a large extent, depend upon the facts of each particular case. But the authorities hereinafter cited are illustrative of the principle under consideration, because of the analagous nature of the risks held therein to have been assumed by the servant.

Thus, a brakeman will be presumed to know of, and to appreciate the danger of coupling, from the inside of a curve, of cars having double deadwoods of unusual length (*Kuhn* v. *McNulta, 147 U. S., 238, 37 L. Ed., 150; Michigan Cent. R. Co.* v. *Smithson*, (*Mich.*) *7 N. W., 791; Chicago, B. & Q. R. Co.* v. *Curtis*, (*Neb.*) *71 N. W., 42;*) to the same effect is the holding as to danger of injury from unblocked frogs (*Southern Pac. C.* v. *Seley, 152 U. S., 145, 38 L. Ed., 391;*) also, as to knowledge of the risk that the drawbars of two cars may slip and pass each other, and thus render dangerous an attempt to couple them on the inside of a sharp curve (*Tuttee* v. *Detroit G. H. & M. R. Co., 122 U. S., 189, 30 L. Ed., 1114;*) so an experienced brakeman can not recover for an injury caused by his miscalculating the actual difference between the heights of two drawheads, he being aware that there was some difference (*Hulett* v. *St. Louis, K. C. & N. R. Co., 67 Mo., 239;*) so as to the danger of going onto the running board of a "hard running" engine, liable to rock and sway (*Southern Pac. Co.* v. *Johnson*, (*C. C. A.*) *69 Fed., 557.* For a collection of the decisions bearing upon this question of imputed knowledge and appreciation of risks, see *4 Labatt on Master & Servant. Secs. 1313 and 1315; St. Louis Cordage Co.* v. *Miller*, (*C. C. A.*) *126 Fed., 495, 511-513.* In the case last cited, an action to recover

for injuries received by the plaintiff as the result of her hand having come into contact with uncovered cogs of a machine, which had been negligently left uncovered, knowledge and appreciation of the situation was imputed to the plaintiff by the court in language especially applicable to the case at bar:

> "She testified that she did not know that it was dangerous to run the gearing uncovered, but she knew the action of the lever, the greasy condition of its handle, its proximity to the mashing cogs, and she could no more have failed to know and to appreciate that the revolving cogs would crush her hand if she permitted it to slip between them than she could have failed to appreciate that boiling water would scald or fire would burn. One can not be heard to say that he does not know or appreciate a danger whose knowledge and appreciation are so unavoidable to a person of ordinary intelligence and prudence in a like situation. * * * The machinery, the cogs, the slippery lever, and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain, in the danger impending from them. It was plain and certain that if the employee permitted her hand to slip between the revolving cogs that hand would be injured. The defect of the unguarded gearing was obvious, the danger from it was apparent, and without a disregard of the rules to which we have adverted and the decisions of the Supreme Court and of the other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and known defect and of a plain and apparent danger, assumed the risk of the injury which she sustained, so that she never had any cause of action against the defendant; and the court below should have so instructed the jury."

Especially in point also in the following quotation from the opinion in *Creola Lumber Co.* v. *Mills*, (*Ala.*) *42 So. 1019:*

> "On the other hand, if it was dangerous to board the locomotive moving at the rate it was, certainly the danger was open and obvious and there is no pretense that the plaintiff was incapable of recognizing and appreciating such danger as is incident to climbing, or attempting to climb, upon a moving locomotive."

There is another phase of the case which supports defendant's contention that knowledge and appreciation of the risk of attempting to board the moving train must be imputed to plaintiff. In his petition, plaintiff alleged "that for a year or more prior thereto, and during the whole time he was in defendant's employment it was the practice of defendant's servants superior in authority to the brakeman to require them to leave the train while in motion and go forward to the tower for orders and return with orders to the train while in motion, instead of causing its said trains to be stopped." (See page 2 Record.) Plaintiff's testimony as to this alleged custom was as follows (see questions 24, 25, page 11, Record):

> "Q. 24. Tell what the custom and practice of the engineers on the train you ran on during your term of service, was as to setting the trains in motion and moving the trains after you had started for orders or time.
>
> "A. Well they would stop the train and I would get off and go up to the front and get an order and catch the train as it came moving by.
>
> "Q. 25. Was the custom then after you left for orders to start the train and have you get on the moving train?
>
> "A. Yes, sir."

It follows from the above that plaintiff knew of this alleged custom to require brakemen to board moving trains, and there-

fore, knowledge and appreciation by him of what he would be compelled to do on this particular occasion, must be conclusively presumed. The rule of law governing this phase of the case is concisely state in *4 Labatt on Master & Servant, Sec. 1325*, as follows:

> "A servant who is, or ought to be, aware of the fact that certain dangerous conditions arising from the construction, arrangement, or operation of the master's instrumentalities are found in so many places or are of such frequent occurrence as to be normal incidents of the employment is deemed to be chargeable as a matter of law, with knowledge of each single instance of those conditions, although it may be apparent that this would not have been a necessary conclusion if his constructive knowledge had been considered with reference solely to the nature of his opportunities for observing that particular instance, and from the wide distribution or frequent occurrence of conditions of a similar description."

In particular see also, *Green* v. *Cross*, (*Tex.*) *15 S. W., 220; Derr* v. *Lehigh Valley R. Co.*, (*Pa.*) *38 Am. St. Rep., 848; O'Neil* v. *Keyes*, (*Mass.*) *47 N. E., 416; Missouri, K. & T. R. Co.* v. *Thompson*, (*Tex.*) *33 S. W., 718.*

The case at bar presents a striking illustration of the necessity for drawing a sharp distinction between the defenses of contributory negligence and assumption of risks. It seems to us that a failure to observe this distinction was the real cause for the holding of the Kentucky courts that the defense of assumed risks had no place in the case at bar. As before stated, it is submitted that an employee attempting to board a moving train must be deemed to have assumed the resulting risk, regardless of whether the train be a "fast moving" or a "slow moving" train. It is only when we come to consider the

question of the employee's own negligence that the speed of the train becomes material; in the latter case, the imminency or probability of injury rsulting from the servant's conduct, or act, becomes a material factor in the case. But in considering the defense of assumed risks, the probability or improbability of injury is immaterial. This distinction was clearly pointed out by Judge Sanborn in *St. Louis Cordage Co.* v. *Miller*, (*C. C. A.*) *126 Fed.*, *495*, *505*, *508*, as follows:

> "The unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk and contributory negligence are distinct and independent defenses, that the former rests in contract and upon the maxim Volenti non fit injuria, and is not conditioned or limited by the probability or improbability, the imminence or the remoteness, of the danger from the risk assumed, or by the existence or by the absence of contributory negligence on the part of the party who undertakes to assume the risk, while contributory negligence is founded upon an absence of ordinary care which causes or contributes to the injury which is the basis of the suit. This conclusion is fortified by the numberless decisions in which the plaintiffs were not guilty of contributory negligence, cases in which prudent persons in the exercise of ordinary care would have assumed and ordinarily did assume the very risks which were the subjects of the actions.
> * * *
>
> "Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable."

Nor will it do to say that because plaintiff's conduct may

have amounted to contributory neglect, he should be entitled to recover because of the provision in the Federal Act that the employee's own negligence shall not be a bar to his right of action. The servant's conduct may be such as to support both defenses, but the two are nevertheless separate and distinct each from the other. The mere fact that a statute, or rule of law, may have eliminated one, does not operate to destroy the availability of the other. See *Narramore* v. *Cleveland, C., C. & St. L. R. Co.*, (*C. C. A.*) *96 Fed., 298; Schlemmer* v. *Buffalo, R. & P. Co., 205 U. S., 1, 51 L. Ed., 681, 220 U. S., 590, 55 L. Ed., 596; Seaboard A. L. Co.* v. *Horton*, **supra.**

For the foregoing reasons it is respectfully submitted that in attempting to board the train in question, the plaintiff must be conclusively presumed to have assumed the consequent risks, and that, therefore, the trial court should have sustained the defendant's motion to direct a verdict for it.

While the Kentucky Court of Appeals did not expressly rule upon defendant's right to a directed verdict on the ground of assumed risks, yet it is manifest that this question was necessarily determined when it was held that the defense of assumed risks had no place in the case. A Federal question was presented in the trial court when defendant moved that court to direct a verdict for it (see pages 21 and 51, Record), and also when it made the refusal of the trial court so to do the basis of a motion for a new trial (see page 54, Record); and the question so presented was necessarily determined adversely to defendant by the judgment and opinion of the Kentucky Court of Appeals.

III.

Even if it should be held that the plaintiff did not, as a mat-

ter of law, assume the risk of injury from his attempt to board the defendant's train, yet it is submitted that defendant was clearly entitled under the evidence to have this defense submitted to the jury under apt and proper instructions. In its opinion rendered herein, the Kentucky Court of Appeals held that the evidence did not warrant the giving of any instruction as to this defense. This, we submit, was manifestly erroneous.

We will not restate the proven facts and circumstances upon which the defendant relies for the purpose of showing the availability of that defense, as they have been fully set out in the previous part of our argument. It is sufficient to say that the plaintiff's two months' experience as a brakeman, his previous employment in defendant's yards at Covington, his admitted knowledge of the custom of boarding trains while in motion under conditions similar to those herein, the fact that the train in question was in full view during all the time he was in the tower and on the platform, that he knew he was expected to board it while in motion, that he was warned by the operator of the train's approach, and advised to go up the track if he wanted to get aboard it, are all circumstances which, to say the least, required that the question as to whether or not plaintiff assumed the risk should be submitted to the jury.

Upon the trial of the case, the defendant requested the court to give to the jury the following instruction (see page 53, Record):

> "The court instructs the jury that when the plaintiff, John J. DeAtley, entered the service of the defendant, railroad company, as brakeman, he assumed all the ordinary risks and hazards of that employment or occupation, and if they should believe from the evidence that the

plaintiff's injuries complained of were the natural and direct results of any of said risks or hazards, then they must find for the defendant."

The Court of Appeals held that this instruction was properly refused upon the theory that it should be said as a matter of law that the boarding of a train running at the rate of 10 to 12 miles per hour was not an ordinary risk of the business. It is submitted that the determination of this question was one for the jury. Moreover, this instruction was clearly applicable to the issues presented by the allegations in plaintiff's petition; the negligence charged in the petition was not that this particular train was operated at a negligent rate of speed, but that the defendant negligently permitted the existence of a custom requiring the brakeman to board trains while in motion, and negligently failed to promulgate rules breaking up such custom.

But even if the above instruction as offered was incorrect and inapplicable to the issues presented by the pleadings and evidence, yet under the Kentucky practice it was the duty of the trial court to have prepared and given a corrected instruction embodying the defense under consideration, i. e., an instruction setting out the circumstances under which an "extraordinary," as distinguished from an "ordinary" risk is assumed by the servant. That such was the duty of the trial court under the state practice (provided there was any evidence upon which to base the instruction) is conceded in the court's opinion. The following statement as to the trial court's duty relative to the giving of instructions under the Kentucky Code practice is stated as follows, in *Louisville & N. R. R. Co.* v. *Harrod, 115 Ky., 877, 75 S. W., 233:*

"The rule upon this question now is that, where a party

in a civil case fails to offer an instruction upon a point of law involved in the case, it is not error in the court to fail to instruct on that point; but if a party offers an instruction upon some point of law involved, which is refused by the court because of defect in form or substance, then it is the duty of the court to prepare, or have prepared, and give, a proper instruction on that point."

And in *Louisville, H. & St. L. Ry. Co.* v. *Roberts, 144 Ky., 820, 139 S. W., 1073,* the Kentucky practice relative to the duty of the trial court to instruct on the various issues of a case, is stated as follows:

"(1) In civil actions the court is not obliged upon its own motion to instruct upon the whole law of the case; that is to say, if there are several issues in a case, upon all of which the parties would be entitled to have the jury instructed, and the court upon its own motion only instructs the jury as to some of the issues, the failure to instruct upon the other issues will not be available error, if the instructions given are correct, although proper exceptions may be saved to the instructions given. But if the instructions given are not correct, and proper exceptions are saved, the error may be taken advantage of upon appeal. (2) If the court undertakes upon its own motion or upon request of either of the parties to instruct the jury upon the law applicable to all the issues, or in other words, to give the whole law of the case, then the court should properly instruct the jury upon each issue that it undertakes to instruct concerning; and, if an erroneous instruction is given that prejudices the substantial rights of the complaining party and proper exception is saved, it will be reversible error. (3) If instructions are offered upon any issue concerning which the jury should be instructed, but they are erroneous in form or substance, then the court should prepare or direct the preparation of a proper instruction in place of the defective ones."

We are calling attention to the Kentucky practice relative to the giving of instructions, for the Court of Appeals seems to have been somewhat in doubt as to whether the rules of the state or Federal practice governed in cases brought in the state courts under the Federal Employers' Liability Act. However, since the rendition of the above opinion it has been decided that in suits in the state court, the state rules of practice and procedure govern. See *Ches. & Ohio Ry. Co.* v. *Kelly's Admx.*, *171 S. W.*, *185; Central Vt. R. Co.* v. *White*, *238 U. S.*, *507*, *59 L. Ed.*, *1433*. It follows, therefore, that defendant is entitled to complain of the trial court's failure to give a proper instruction upon the defense of assumed risks. Moreover ,this particular Federal question was assumed to be in issue and was expressly decided by the state court, which suffices to give this court authority to re-examine such questions on writ of error. *State of Montana* v. *Rice*, *204 U. S.*, *291*, *51 L. Ed.*, *490*.

It is submitted that the question of age and experience is not involved herein. It does not require any especial experience, or age, to understand and appreciate the dangers attendant upon an attempt to board a moving train. Plaintiff had had two months' experience as a brakeman, and had also been employed in the railway yards at Covington. So far as his age was concerned, he was to all intents and purposes an adult, possessing certainly the average physical and mental capacity.

IV.

It is apparent that the alleged negligent act upon which a recovery was allowed herein was the negligence of the engineer in operating the train past the F. G. Cabin at such a rate of speed as to make it unusually dangerous for plaintiff to board same. In short the negligence complained of was the negli-

gence of a fellow servant. The contention was advanced by plaintiff in the state courts, that in view of the provision of the Federal Act abolishing the defense known as the fellow servant rule, a servant injured by reason of the negligence of another employee could not, under any circumstances, be deemed to have assumed the risk of such negligence. It is submitted that such a proposition is manifestly unsound. The effect of the provision making the employer liable for any injury "resulting in whole or in part from the negligence of any of the officers, agents or employees," is simply to abrogate the common law rule denying a recovery for the negligence of a fellow servant to the extent that such negligence is placed upon the same basis as the negligence of the master; the risk is no longer an ordinary risk, assumed by the contract of employment; but, like any other risk arising from the master's neglect, is assumed when known and appreciated.

By the terms of the Act (Section 1) the carrier-master is made liable for any injury or death caused, *first*, by reason of "the negligence of any of the officers, agents or employees of such carrier," or *second*, "by reason of any defect or insufficiecy due to its negligence, in its cars, engines, appliances, etc." It will thus be seen that the negligent act of an employee and the negligence of the carrier itself in the failure to perform the master's non-delegable duty of furnishing and maintaing proper equipment, are placed upon the same basis; the carrier is made liable for all injury resulting from either cause, and in both cases such liability is conditioned upon the existence of negligence. It is manifest, therefore, from the very similarity of the wording of the two clauses, that if the servant can assume the risk of injury from a negligent defect in the appliances furnished by the master, he can to the same

extent, and under the same conditions, assume the risk of injury from the negligence of the master's servants. In both cases the risk of injury is assumed only when the negligent defect, or the negligent act, is known and appreciated. It is submitted that the ruling in the *Horton* case, supra, to the effect that the risk of injury from a defect or insufficiency in the master's equipment and appliances may be assumed when the servant knows of, and appreciates, such defect and the danger therefrom, is equally applicable to the risk of injury from the negligence of a co-employee.

The precise question here presented was decided by the Eighth Circuit, in an opinion delivered by Mr. Justice Van Devanter, in the case of *Chicago & Great Western Ry. Co.* v. *Crotty, 141 Fed., 913, 4 L. R. A., (N. S.) 832*, from which we quote as follows:

> "The claim is also made that, under the statute of Iowa (Code 1897, Section 2071), as interpreted by the supreme court of that state in Phinney v. Illinois C. R. Co., 122 Iowa, 488, 98 N. W., 358, the deceased did not assume the risk of injury from obedience to a negligent direction of the conductor because the latter was a fellow servant. Careful examination of the statute, the case cited, and other decisions of the same court discloses that, so far as the statute is applicable to the present case, its only effect is that of attributing the negligence of the conductor to the defendant. It abrogates, in respect of the 'use and operation of any railway,' the common law rule that an employee, by his contract of employment, assumes the risk of injury from the future negligence of a fellow servant; but it does not affect the rule, that, where an employee voluntarily undertakes an act, the danger of which is at the time obvious or actually known to him, and is inherent in the act itself or in the particular manner in

which it is to be performed, he assumes the risk of injury therefrom. In the case cited a railroad employee was injured in a collision caused by the negligence of a train despatcher of which he neither had nor could have had any knowledge prior to the injury; while in the present case the negligence of the conductor was an existing fact or condition with knowledge and appreciation of which the deceased elected to participate in the staking of the car, and to chance the danger from which the injury ensued. This distinction is clearly recognized in the decisions of the supreme court of the state. Thus, in Pearl v. Omaha & St. L. R. Co., 115 Iowa, 535, 88 N. W., 1078, where the death of a brakeman was caused by the negligence of the conductor in failing to set the brakes upon a detached portion of his train, of which the brakeman could have had no knowledge at the time, it was held that there was no assumption of the risk, because, as was said, a railroad employee 'never, under any statute, assumes the risk of the future unanticipated negligence of his co-employee.'' And in Cowles v. Chicago, R. I. & P. R. Co., 102 Iowa, 507, 71 N. W., 580, where a railroad employee was injured by going in front of a moving engine to adjust a turntable when the engine had almost reached the turntable and was moving with substantially unchecked speed, it was held that he assumed the risk of injury, although it arose primarily from the negligence of a co-employee whose duty it was to stop the engine and wait for a signal indicating that the turntable was adjusted. It was said in that case: 'Under the repeated adjudications of this court, recovery can not be had when one voluntarily exposes himself to danger of which he knows, or might have known by the exercise of ordinary care.'

''That the statute relied upon does not prevent an assumption of the risk in instances like the present, where the danger, though arising from negligence, is known and

appreciated, is also shown in the case of Martin v. Chicago, R. I. & P. R. Co., 118 Iowa, 148, 153, 158, 59 L. R. A., 698, 96 Am. St. Rep., 371, 91 N. W., 1034."

In *St. Louis, I. M. & S. Ry. Co.* v. *Ledford, (Ark.) 119 S. W., 1123,* the same conclusion was reached in regard to the effect of an Arkansas statute similar in terms to the Federal Act:

> "We think that under the statute a servant who becomes aware of a dangerous situation created by the negligence of a fellow servant and appreciated the danger must be held to have assumed the risk of such danger when he continues in the service with such knowledge and appreciation, for the negilgence of the fellow servant is by the statute made the same as that of the master so far as it affects the responsibility of the latter, and if the risk of danger caused directly by negligence of the master can be assumed, no reason appears why risk of danger caused by negligence of the fellow servant can not likewise be assumed."

In several Massachusetts cases construing a somewhat similar statute of that state, it is held that the negligence of a superior servant is not one of the risks assumed by his contract of employment: thus implying that the risk of such negligence may be assumed, if, with knowledge thereof, the servant continues in the employment. See *Murphy* v. *New York, Etc., R. Co., 72 N. E., 330; Meagher* v. *Crawford Laundry Mach. Co., 73 N. E., 853.*

It is accordingly submitted that in action under the Federal Act, so far as the defense of assumed risks is concerned, there is no difference between the negligence of the master and the negligence of a co-employee.

V.

The defendant requested the trial court to instruct the jury that in attempting to board the train while moving at the rate of speed shown by the evidence, the plaintiff was negligent as a matter of law. Said instruction is as follows:

> "The court instructs you that in the event you find the defendant negligent under instruction No. 1, then you must also take into consideration the question of the plaintiff's negligence. The court instructs you that the plaintiff, in attempting to board the train in question, was himself negligent, and that even though you find the defendant negligent under instruction No. 1, yet because of plaintiff's own negligence he is not entitled to recover the full damages sustained by him as a result of the accident and injury to him, but only to such proportional amount as the negligence, if any, of the railroad company bears to the entire negligence of both. Therefore, even though you find for plaintiff under instruction No. 1, you will diminish the damages awarded to him in proportion to the amount of plaintiff's own negligence."

If, as is practically assumed by the Court of Appeals, the engineer was negligent in operating the train at said rate of speed, then by parity of reasoning, the plaintiff was negligent in attempting to board same. See *Hurst* v. *Kansas City, P. & G. R. Co.*, (*Mo.*) *85 Am. St. Rep., 539; Dowell* v. *Vicksburg & M. R. Co., 61 Miss., 519; Louisville & N. R. Co.* v. *Wallace*, (*Tenn.*) *15 S. W. 921; Whitfield* v. *Atlantic C. L. R. Co.*, (*N. C.*) *60 S. E., 1126; Southern R. Co.* v. *Williams*, (*Miss.*) *38 So., 394.*

Although the servant's contributory neglect is not a bar to the recovery of damages, yet it is still the duty of the court to instruct the jury that the servant's conduct amounted to

negligence per se where the facts and inferences to be drawn from them are not conflicting as to the fact that contributory negligence existed. **See** ***Thornton's Federal Employers' Liability Act, Section 115.***

Respectfully submitted.

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Talbert & Browning

Counsel for Plaintiff in Error.

6

Supreme Court of the United States.

OCTOBER TERM, 1915

No. 274

Chesapeake and Ohio Railway Company, ... *Plaintiff in Error,*

v.

John J. DeAtley, ... *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR

ALLAN D. COLE,
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HOLMES & ROSS, Carlisle, Ky.
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Of Counsel.

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STATEMENT

May It Please the Court:

The defendant in error, John J. DeAtley, on December 10, 1910, at the age of nineteen, entered the service of plaintiff in error as brakeman on its Cincinnati division. Before entering its service as brakeman, he had made only two trips as brakeman from Covington to Russell; such preparation constituting his only experience for this service. On January 22, 1911, he met with an accident about a quarter of a mile west of the coal

docks near the tower house not far from the limits of the City of Maysville. He was head brakeman at the time of the accident and had ridden in the engine with the engineer, Kavanaugh, from Russell to said coal docks. The train on which he was working was No. 95 Manifest Freight Train; and when it arrived at Springdale, about six miles east of Maysville, the engineer told him to call the operator and see if he could get the time on No. 1, or an order. He called the operator but did not understand what he said. The fast passenger train No. 1 coming in from the east that morning was late; and the engineer wanted to know if his train had time to get into Maysville without danger from a collision with No. 1. Having ten minutes to spare, the engineer concluded to, and did run the train to the coal docks west of Springdale, and stopped for coal. He did not countermand his order to defendant in error to ascertain the time of No. 1 and to get instructions in regard to it; so when they got to the coal docks, defendant in error proceeded further west to the tower house and communicated his mission to the telegraph operator, Andrew Boyd.

In the meanwhile, the engineer missed the head brakeman, the defendant in error, from his place in the engine, and, knowing that he had not countermanded his order given to defendant in error at Springdale, he started the train toward Maysville. When he came within about 300 feet of defendant in error, at which time he says he saw him standing on the platform with the message, he was running the train at the rate of about ten or twelve miles an hour. The fireman at that time was putting coal in the fire, and the engineer crossed over to his side of the engine to receive the order. The defendant in error, who was standing squarely in front of the approaching engine until the

cowcatcher passed him, not realizing the speed of the train, and relying upon the engineer to run the train at a rate of speed to enable him safely to get aboard, caught hold of the grab-iron of the engine and put one foot on the step. However, his foot hit the step and then slipped off by reason of his weight and the speed of the train. Thereupon, his left leg fell on the track beneath the engine and the coal tender ran over it, crushing it to such an extent that it was amputated about eight inches below the knee. The jury returned a verdict for $9,050.00, and, the judgment rendered thereon having been affirmed by the Court of Appeals of Kentucky, the plaintiff in error has prosecuted a writ of error to this court.

ARGUMENT

The plaintiff in error has assigned twelve alleged errors.

I.

"*The said Court of Appeals of Kentucky erred in its construction of the Federal Employers' Liability Act of 1908; that the petition filed in this cause contained facts or allegations sufficient to authorize a recovery in favor of defendant in error, as said petition and amendment simply plead legal conclusions without any issue of fact being tendered or pleaded.*"

No Federal question, it is submitted, is presented by this assignment; for the ruling of the State Court that pleadings are sufficient to permit a determination of a point on which the decision turned, involves no Federal question. *Grand Rapids & Indiana R. R. Co.* v. *Butler, 159 U. S., 91; Yazoo, etc., Ry. Co.* v. *Adams, 180 U. S., 9; National Foundry, etc.*, v.

Oconoto, etc., Co., 183 U. S., 237. In the more recent case of *Central Vt. R. Co.* v. *White, 238 U. S., 511,* this court said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, *sufficiency of the pleadings*, rules of evidence, and statute of limitations—depend upon the law of the place where the suit is brought. (McNeil v. Holbrook, 12 Pet., 89.")

II.

"*That said Court of Appeals erred, as shown by the undisputed facts in the record, in holding that there was any legal evidence offered at the trial of this cause in the Circuit Court of Mason County either proving or tending to prove that plaintiff in error, or one of its agents, servants or employes were guilty of any negligence whatever at the time the defendant in error was injured.*"

The failure to exercise ordinary care, when the engineer not only *knew* that defendant in error went to the tower, but also *knew* that he would have to board the train again and *saw* him on the platform before the injury, was certainly negligence. If he had stopped the train and then allowed defendant in error to get aboard, would it then have been possible for him to lose his leg? If, instead of twelve or fifteen miles an hour, the engineer had driven the train at the rate of four miles an hour, would defendant in error then have lost his leg? If he, an inexperienced boy, thought the train was going at a slow rate of speed, when in fact it was not, this did not relieve plaintiff in error of the consequence of its carelessness and negligence in pulling him loose by the train's momentum from the grab-iron

on the engine, and throwing him upon the ground underneath the car wheels. Moreover, there was an utter failure to warn and instruct him of the danger. *DeAtley* v. *C. & O., 147 Ky., 315; DeAtley* v. *C. & O., 205 Fed., 592; Galveston R. Co.* v. *Sullivan, 53 Tex. Div. App., 394, 115 S. W.. 615.*

In the case of *C., N. O. & T. Ry. Co.* v. *Swann's Admr., 160 Ky., 462*, it is said:

> "It will be noticed that the Federal Act under which this action was brought does not undertake to define the character or degree of negligence necessary to a recovery. This being so, we think when an action is brought under the Federal Act in our State courts to recover damages for injuries suffered on account of the negligence of another employe *the rules of law prevailing in this State* must be looked to in determining whether the acts or omissions complained of amount to negligence. There is no difference in cases like this in the character or degree of negligence necessary to sustain a verdict and judgment, whether the action be brought under the Federal or State law."

III.

"*That said Court of Appeals erred in holding that there was any legal evidence introduced upon the trial of the cause proving, or tending to prove, any negligence upon the part of the employes of plaintiff in error in charge of the train which ran over defendant in error.*"

What has just been said with reference to the second assignment of error, applies also to this.

IV.

"*That the said Court of Appeals erred in holding that there*

was any evidence introduced upon the trial of the cause which authorized, or tended to support, a recovery against the plaintiff in error under the provisions of the Federal Employers' Liability Act of 1908."

What has been said with reference to the second assignment of error, applies also to this.

V.

"*That the said Court of Appeals erred in refusing to hold that, on the undisputed facts disclosed by the record, the defendant in error was injured by reason of his own voluntary acts and conduct, without any reference to the alleged wrongful or negligent acts of plaintiff in error, or its agents and employes.*"

If the plaintiff in error was guilty of *any* causative negligence, no matter how *slight* in comparison with that of defendant in error, no matter how *gross*, it was a question for the jury. *N. Y., C. & St. L. R. Co.* v. *Niebel, 214 Fed., 955.*

In the case of *Grand Trunk Company* v. *Cummings, 106 U. S., 27*, it is said:

> "If the negligence of the company contributed to, that is to say, had *a share* in producing the injury, the company was liable even though the negligence of appellee's servant was contributing also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong."

Thompson on Negligence, Volume 5, Section 5602, among other things, says:

> "*Where it was a part of the switchman's duty to jump*

on a moving train, and the evidence whether he should have attempted to jump on at the place where he did was conflicting, *and the plaintiff testified that he did not know the place was dangerous*, the question of his *contributory negligence* is for the jury."

Thompson on Negligence, Volume 8, Section 5602, in the notes, says:

> "*The general rule* that persons injured while attempting to get on or off moving cars are guilty of *contributory negligence* does not apply with *absolute* strictness to train hands accustomed to get on and off moving cars in the performance of their duties." Charlton v. St. Louis, etc., R. Co., 200 Mo., 413; Heilig v. Southern R. Co., 152 N. Car., 469; Whitfield v. Atlantic Coast Line R. Co., 147 N. Car., 236.

VI.

"*That said Court of Appeals erred in holding that there was any legal evidence introduced on the trial of this cause which proved, or tended to prove, that there was any negligence in the operation of the train which ran over defendant in error, or upon the part of the employes in charge of said train, which operated as a proximate cause of the injury to defendant in error.*"

The *uncontradicted* testimony of defendant in error is as follows:

> "Q. 51. I asked you how you proceeded to get aboard this train, what you did in order to do so, and then what happened?
>
> A. I went down on the platform as the engine pulled up and caught the grab-iron and put one foot on the step, —I think one foot hit the step and then slipped off *and*

the speed of the train and *my weight*, I suppose, *threw me loose.*"

Proximate cause is a question for the jury. *White's Supplement to Thompson on Negligence, Section 161; San Francisco & P. S. S. Co.* v. *Carlson, 161 Fed., 854; Hales* v. *Michigan Cent. R. Co., 200 Fed., 537.*

In the case of *Milwaukee, etc., Ry. Co.* v. *Kellogg, 94 U. S., 46*, it is said:

> "*The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it.*"

Labatt on Master & Servant, Volume 4, Section 157, says:

> "The court will not undertake to settle it in any case where it involves the weighing of conflicting evidence, the balancing of probabilities and the drawing of inferences."

In the case of *Meyers* v. *Pittsburgh Coal Company, 233 U. S., 192*, it is said:

> "The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that in the examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the *proximate* cause of his death. This question, however, *was submitted to the jury* and found against the defendant *in the trial court.* Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them, a verdict and judgment of the district court must

be affirmed. . . . . *We think reasonable men, considering the testimony adduced, might well have come to this conclusion, and that it was error in the Appellate Court to set aside the verdict for the entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon the testimony, which, when fairly considered, might sustain the verdict.*" See Humes v. United States, 170 U. S., 210.

VII.

"*That the said Court of Appeals erred in refusing to hold that the injury to the defendant in error was, under the undisputed facts disclosed by the evidence, the result of a risk assumed by him.*"

The *uncontradicted* testimony of defendant in error, in chief, is as follows:

"Q. 47. As the train approached you, did you or not think you could get aboard safely?

A. Yes, sir, I did.

Q. 48. Did you or not realize at what rate of speed it was running?

A. No, sir, I thought it was running slow enough to board the train all right."

And on cross examination he said:

"Q. 81. How fast was it running?

A. I could not judge of the speed, but it didn't look to be running very fast.

Q. 85. You didn't pay much attention to the speed, did you?

A. I could not judge of it.

Q. 86. Did you pay much attention to it?

A. I *could* not judge."

No Federal question is presented by this assignment of error, because there is no room in this case for the assumption of ordinary risks, and no instruction was asked in the trial court by the plaintiff in error on the assumption of extraordinary risks. Hence, it was not error to refuse the instruction offered on ordinary risks, nor was the trial court bound to modify such instruction so as to make it apply to extraordinary risks. *Catts* v. *Phalen*, *2 Howard*, *382; Buck* v. *Insurance Company*, *1 Pet.*, *159; Haffin* v. *Mason*, *82 U. S.*, *671.* "Congress in passing the Federal Employers' Liability Act evidently intended that the Federal Statute should be construed in the line of these and other decisions of the Federal Courts. Such construction of the statute was, in effect, approved in Seaboard Airline R. Co. v. Moore, 228 U. S., 434." *Central Vt. R. Co.* v. *White*, *supra*, *868.*

Moreover, the court will not inquire into questions relating to pleading and practice in state courts. *Yazoo, etc., Ry. Co.* v. *Adams*, *180 U. S.*, *9.* For the appellate state court may, as it did in the case at bar, rest its affirmance of the judgment below on some question of practice or pleading and such a decision is not adverse to the Federal right or claim. *Matheson* v. *Bank of Mobile*, *7 How.*, *261; Chippel Chem. Co.* v. *Sulphur, etc., Co.*, *172 U. S.*, *473; Semple* v. *Hagar*, *4 Wall.*, *434; Smith* v. *Adsit*, *16 Wall.*, *188; Commercial Bank* v. *Rochester*, *15 Wall.*, *642; Chauteau* v. *Gibson*, *111 U. S.*, *201.*

No Federal question is presented for the further reason that assumption of risk is a question of common law, and it is well settled that, if a state decision is made upon rules of general jurisprudence or upon other grounds broad enough to sustain

the judgment without considering the Federal question, jurisdiction of this court will not attach. *New Orleans* v. *New Orleans Water Works Company, 142 U. S., 84; West Tennessee Bank* v. *Citizens Bank, 13 Wall., 433.*

But coming to the merits of the refusal to instruct the jury upon assumption of risk, the court's attention is called to the case of *Central Vt. R. Co.* v. *White*, supra, wherein it is said:

> "Complaint is made because the court failed to instruct the jury as to the law respecting the assumption of risks. But there was not only no request to charge on that subject, but there is no evidence that White *knew* of the negligence of the agent in giving a 'clearance card' or of the leaking cylinder which obscured the vision of the engineer. He did not assume the risk arising from the unknown defects in engines, machinery or appliances, while the statute abolishes the Fellow Servant Rule. 35 Stat. at L., 65, Chapter 159, Section 2, Comp. Stat. 1913, Section 8658. *Under the facts there was, therefore, no error in failing to charge the jury on the subject of assumption of risks.* Southern R. Co. v. Gadd, 233 U. S., 572; Gila Valley G. & N. R. Co. v. Hall, 232 U. S., 102; Seaboard Airline R. Co. v. Horton, 233 U. S., 492."

In the case of *Southern Ry. Co.* v. *Gadd, 233 U. S., 572*, it is said:

> "Coming to the case made by this record, although as we have said, it is manifest that the cause of action was based upon the Employers' Liability Act, *we are of the opinion that it presents for decision no question concerning the interpretation of that act, since all the questions which require to be decided merely involve considerations of general law depending in no sense upon the broad significance of the Employers' Liability Act.* Under these conditions

it is apparent that the case is absolutely controlled by the King case, and we, therefore, content ourselves with saying that, as after an adequate examination of the record we find no ground whatever affording a clear conviction that error was committed, affirmance must follow."

In the case of *Illinois Cent. R. R. Co.* v. *Porter*, *207 Fed.*, *315*, the Circuit Court of Appeals, sixth circuit, said:

> "In Southern Ry. Co. v. Gadd, 207 Fed., 277, (decided on May 6, 1913,) we held that even at common law the employe did not assume the risk of the employer's negligence from the *unusual and unexpected method of operation;* that is to say, not incidental to the ordinary method. Evidence that the work was being done at the time in question 'in the usual and ordinary way' was not evidence *that negligent conduct*, such as charged in this case, *was the usual and ordinary method of doing the business.* The natural inference would be that *such negligence* of the fellow trucker was *outside the usual and expected.* The *risk* of such negligence was *not*, in our opinion, *assumed* by decedent, and this without reference to any construction of the Employers' Liability Act. *The defendant's requests, based upon the theory of such assumption of risk, were, we think, properly refused, as not supported by the proper construction of the testimony in that respect.*"

So, likewise, the Court of Appeals of Kentucky in its opinion, speaking of the trial court's refusal to instruct on assumption of risk, said: "It is not *shown*, nor will we *assume* that the contract of employment contemplated, or that it was *customary* for brakemen to get on trains moving at a *dangerous* rate of speed."

VIII.

"*That the said Court of Appeals erred in holding that there*

was no evidence authorizing the submission to the jury of the question as to whether or not the injury to the defendant in error was the result of a risk assumed by him."

In the case of *Southern Ry. Co. in Kentucky* v. *Mauck*, *152 Ky.*, *500*, it is said:

> "Counsel in cases like this must not overlook the fact that the master will not be excused for his failure to warn and instruct an inexperienced servant, unless it appears that the servant not only *understood* but *appreciated* the danger. There is quite a difference between knowing that you will get hurt if you do a certain thing and such *appreciation* of the *danger* as will cause you to stop and think before you do it."

Now, in the case at bar there is not only no evidence that the defendant in error, an inexperienced boy, had been instructed or warned of the danger, but on the contrary there is evidence that he had been expressly directed by the engineer to get the desired information, and there is absolutely no evidence that he knew and appreciated the danger of getting on the moving engine. But even if defendant in error had discovered the danger when he was injured but had no time deliberately to chose to take his chances, *he did not assume the risk. Ill. Cent. R. Co.* v. *Stewart*, *223 Fed.*, *34; Yazoo, etc., R. Co.* v. *Wright*, *235 U. S.*, *376; 26 Cyc.*, *1177; C., N. & T. P. Ry. Co.* v. *Goldston*, *156 Ky.*, *410.* Hence, there was no error in refusing an instruction on assumption of risk in this case.

IX.

"*That the said Court of Appeals erred in holding that the*

Mason Circuit Court properly refused to give to the jury instruction 'H' offered by plaintiff in error."

The proposition is too clear for argument that the negligence of the engineer and train crew was not one of the ordinary risks and hazards assumed by defendant in error in his employment.

X.

"*That the said Court of Appeals of Kentucky erred in holding that, on the undisputed facts disclosed by the record, there was no evidence introduced upon the trial of this cause that proved, or even tended to prove, that the speed of the train and the risk of injury from an attempt to board same was known to defendant in error, or was so open and obvious that an ordinarily prudent person should have known and appreciated them; and in refusing to hold that the jury should have been instructed upon this phase of the case.*"

No Federal question, it is submitted, is presented by this assignment of error for the reasons heretofore given.

XI.

"*That the said Court of Appeals erred in refusing to hold that, under the undisputed facts as disclosed by the record, the speed of said train and the danger of attempting to board same, was known to defendant in error, or was so open and obvious to him that he should have known thereof.*"

This assignment of error being substantially the same as the one immediately preceding, it is submitted that no Federal question is presented thereby, for the reasons heretofore given.

XII.

"*That the said Court of Appeals erred in refusing to hold*

that, under the undisputed facts as disclosed by the record, the defendant in error was guilty of contributory negligence per se; and in refusing to hold that the Mason Circuit Court erred in not instructing the jury, under the provisions of the Federal Employers' Liability Act of 1908, that the damages sustained by the defendant in error were required to be diminished on account of, and in proportion to, said contributory negligence, in accordance with instruction 'G' offered by plaintiff in error."

No Federal question, it is submitted, is presented by this assignment of error, because the facts and inferences therefrom are conflicting as to the existence of contributory negligence, and because in a long line of decisions it is a well settled rule of the Court of Appeals of Kentucky that the question of contributory negligence in such instances is for the jury. For example, in the case of *Scheben* v. *George Wiedeman Brewing Company, 161 Ky., 417*, it is said:

> "The rule as to when a peremptory instruction should be given was declared in Dolfinger v. Fishback, 12 Bush., 380, to be as follows:
>
> "The rule upon this point seems to be that where there is no room for honest difference among intelligent men as to whether the conduct of the defendant was that of an ordinarily prudent man, in view of all the facts and circumstances surrounding him, the question may be decided by the court as one of law. (Hackford v. N. Y. C. R. R. Co., 53 N. Y., 654; D. & N. R. R. Co. v. Van Steinburg, 17 Mich., 99; Cox v. Burbridge, 13 Com. B. N. S., 430; Gaynor v. Old Colony R. Co., 100 Mass., 208; Welfare v. Brighton R. Co., L. R., 4, Q. B., 493.)
>
> "But where, although the facts are *undisputed*, the court is unable to say that there is *no room* for honest *dif-*

> *ference* of opinion as to the *conduct* of an ordinarily prudent man under the circumstances, but that question is to be decided upon *inferences* to be drawn from the facts already established, those *inferences* must be drawn by the *jury* unless they are *certain* and *incontrovertible.* (D. & M. R. R. Co. v. Van Steinburg, 17 Mich., 99; R. R. Co. v. Stout, 17 Wall., 659.")

In the case of *Buena Vista County* v. *Iowa Falls, etc., R. Co., 112 U. S., 177,* it is said:

> "Other errors are assigned upon the record, relating, however, to matters of pleading and practice under the laws of the state, which, as they involve no Federal question, are not proper for our consideration."

For the foregoing reasons, it is earnestly insisted that in the absence of any Federal question, this court should not take jurisdiction, and that the writ of error should be dismissed; but if not, that the questions presented are so completely foreclosed by previous decisions of this court as to be both frivolous and dilatory, and, hence there should be an affirmance with damages.

Respectfully submitted,

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CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* DE ATLEY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 274. Argued March 10, 1916.—Decided May 22, 1916.

The Employers' Liability Act abrogated the common-law fellow servant rule by placing negligence of a co-employee upon the same basis as negligence of the employer.

In saving the defence of assumption of risk in cases other than those where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death, the Employers' Liability Act places a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk.

A railroad employee having voluntarily entered an employment requiring him on proper occasions to board a moving train assumes the risk normally incident thereto other than such risk as may arise from the failure of the engineer to use due care to operate the train at a moderate rate of speed so as to enable his co-employee to board it without undue peril.

Such an employee may presume the engineer will exercise due care for his safety and does not assume the risk attributable to operation at unduly high speed until made aware of danger unless the undue

speed and consequent danger are so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger.

An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them.

Where an action under the Employers' Liability Act is tried in a state court local rules of practice and procedure are applicable, and if the state appellate court holds that the trial court failed to follow such a rule relating to an instruction, but affirmed on the ground that there was no question for the jury respecting the question on which the instruction was asked, and in fact there was such a question, it is incumbent on this court to review such decision.

159 Kentucky, 687, reversed.

THE facts, which involve the validity of a judgment in an action in the state court for personal injuries under the Employers' Liability Act, are stated in the opinion.

Mr. E. L. Worthington, *Mr. W. D. Cochran* and *Mr. Le-Wright Browning* for plaintiff in error, submitted.

Mr. Allan D. Cole, with whom *Mr. H. W. Cole* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

In this action, which was brought in a state court under the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65), the following facts appeared or might reasonably be inferred from the evidence most favorable to defendant in error (plaintiff below), in the light of which the initial question touching the validity of the judgment in his favor must be determined:

On January 22, 1911, plaintiff was in the employ of defendant and acting as head brakeman on train No. 95—a fast west-bound interstate freight train. When the

train reached a station called Springdale, about six miles east of Maysville, in Kentucky, the train engineer directed plaintiff to go to a nearby railway telephone, call up the operator, and ascertain the whereabouts of train No. 1, which was a fast west-bound passenger train; the object being to determine whether it was safe for No. 95 to proceed to Maysville ahead of it. Plaintiff was unable to understand the operator and so reported to the engineer. He then got into the cab of the locomotive and the train proceeded to the coal docks, about one mile east of Maysville and about 460 yards east of a telegraph station in a signal tower known as the F. G. Cabin, where it stopped for coal and water. Plaintiff was directed by the engineer to go forward to F. G. Cabin and ascertain from the operator the whereabouts of train No. 1. Plaintiff went to the tower, and was there advised that his train had time to reach Maysville. He immediately descended to the platform in front of the tower and beside the track, and saw that his train was approaching. He waited for it, and when it reached the platform he attempted to board the engine. He could not accurately judge the speed of the train, but it appeared to him to be going slowly enough for him to get aboard it. He caught hold of the grab iron and put one foot on the step, and then the speed of the train combined with his weight caused his foot to slip and loosened his hold, so that he fell beneath the wheels of the tender and his arm was cut off. He had been employed as brakeman for about six weeks, and before that had made two round-trips over the road for the purpose of becoming acquainted with his duties. During the time of his employment he had frequently been called upon, under orders of the train engineer, to leave the train and go forward to signal towers for orders or information and then mount the train as it came moving by. On the occasion of the accident the train was running about twelve miles per hour.

The case went to the jury under instructions making defendant's liability dependent upon whether the engineer, with knowledge of plaintiff's presence at the telegraph tower upon business connected with the operation of the train, and with knowledge of his purpose to board the train, negligently operated the train at such a rate of speed as to make plaintiff's attempt to board it unusually hazardous. There was a verdict for plaintiff and the resulting judgment was affirmed by the Court of Appeals of Kentucky. 159 Kentucky, 687.

Upon the present writ of error, it is not disputed that there was sufficient evidence of the negligence of the engineer to require the submission of the case to the jury. It is argued that there was no substantial evidence to support the conclusion that such negligence was the proximate cause of the injury; but this is so clearly untenable as to require no discussion. The remaining questions turn upon the application of the law respecting assumption of risk.

It is insisted that even conceding the train was operated at a negligent rate of speed in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt. The act of Congress, by making the carrier liable for an employee's injury "resulting in whole or in part from the negligence of any of the officers, agents or employees" of the carrier, abrogated the common-law rule known as the fellow-servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee (*Seaboard Air Line* v. *Horton*, 233 U. S. 492, 502), the Act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand

to the question whether a plaintiff is to be deemed to have assumed the risk.

On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other. *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

It is argued that so far as the question of assumed risks is concerned, it makes no difference, in the case of a brakeman about to board a moving train, whether it is operated at a low or at a high rate of speed; that if the train is moving slowly the risk is an ordinary one incident to the business of railroading; while if it is moving rapidly the risk is open, obvious and apparent. Were we to consider only extreme cases, such as were instanced in argument, the point might be conceded; that is, that mounting a train operated at one mile per hour is an ordinary risk, while mounting a train operated at fifty miles per hour presents a risk which, although extraordinary, is open, obvious and apparent. But these extremes do not present an apt illustration. A speed very much below fifty miles would endanger the brakeman's safety, at the same time being much less apparent. If those operating the train

in question knew that plaintiff intended to board it at that point—and the verdict is to that effect—the jury was warranted in finding that plaintiff had a right to expect that the train would be moving at a moderate rate of speed such as would enable an ordinarily careful brakeman to get on with reasonable safety; and this upon the ground that as head-brakeman plaintiff had the right—indeed, that it was his duty—to get upon the engine, since otherwise the train would be left without a head brakeman and the engineer without the information required for the safe operation of the train; and that plaintiff had no notice nor any opportunity to determine with reasonable certainty what the speed of the train was, or that it was too great for his safety, until the engine had practically reached him. It cannot be said, as matter of law, that a speed of twelve miles per hour would necessarily be obvious to him as a dangerous speed, before he made the attempt to board the train.

It is insisted that the true test is, not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. *Gila Valley Ry. Co.* v. *Hall, Seaboard Air Line* v. *Horton, ubi supra.*

We conclude that there was no error in refusing to peremptorily instruct the jury to return a verdict in favor of defendant.

Error is assigned to the refusal of the trial court to instruct the jury as follows: That when plaintiff entered defendant's service as brakeman he assumed all the ordinary risks and hazards of that employment, and if the jury should believe from the evidence that his injuries were the natural and direct result of any of such risks or hazards, they must find for the defendant. The instruction thus requested was defective, and there was no error in refusing to give it in this form, since it embodied no definition of "ordinary risks and hazards," nor any qualification appropriate to the particular facts of the case. The *gravamen* of plaintiff's complaint, as developed at the trial, and the sole theory upon which the case was submitted to the jury, was that the negligence of the engineer in operating the train at an unduly high rate of speed created an unusual and extraordinary hazard. An instruction upon the question of assumption of risk, dealing solely with the ordinary hazards of the employment, and not pointing out that a different rule must be applied with respect to an extraordinary risk attributable to the engineer's negligence, would probably have confused and misled the jury.

But it appears that in Kentucky there is an established rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, but they are incorrect in form or substance, it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in the place of the defective ones. *Louisville & Nash. R. R. Co.* v. *Harrod*, 115 Kentucky, 877, 882; *West Kentucky Coal Co.* v. *Davis*, 138 Kentucky, 667, 674; *Louisville, H. & St. L. Ry. Co.* v. *Roberts*, 144 Kentucky, 820, 824.

Although the present action was based upon a Federal

statute, it was triable and tried in a state court, hence local rules of practice and procedure were applicable. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, this day decided, *ante*, p. 211. The Kentucky Court of Appeals assumed for the purposes of the decision that the case was one where the trial court ought to have followed the local practice and prepared or directed the preparation of a proper instruction covering the question of assumption of risk, and it sustained the judgment only upon the ground that there was no question for the jury respecting it. Whether there was, is a question of law, and of course, in this case, a Federal question; and since the Court of Appeals assumed to decide it, it is incumbent upon us to review the decision. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 257.

We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive and appreciated the extraordinary danger, or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. The Court of Appeals reasoned that plaintiff's duties required him to be upon the passing train; that if he failed to board it he would be left behind; that he had a right to assume the engineer would run the train at a speed that would enable him to get on in safety;

that he was facing the train, which was going directly toward him; that, as a matter of common knowledge, one standing in that position cannot form an accurate judgment of its speed until it comes quite near to him; and that his opportunity to observe the speed was limited to the brief space of time that elapsed between the passing of the front end of the engine and the cab, where it was his purpose to get on; and the court determined that, under such circumstances, "it is well-nigh impossible to tell the difference between a rate of from four to six miles an hour, when an ordinarily prudent brakeman might get on with reasonable safety, and a rate of from ten to twelve miles an hour, when it would be dangerous for him to do so," and that "all the circumstances tend to show that knowledge of the speed of the train came to him so suddenly and unexpectedly that he did not have an opportunity to realize and appreciate the danger of getting on." Conceding the force of the reasoning, we are bound to say that, in our opinion, it cannot be said, as matter of law, to be so incontrovertible that reasonable minds might not differ about the conclusion that should be reached. We therefore hold that the question of assumption of risk was one proper for submission to the jury, and, assuming as the court assumed that the local practice required the preparation of a proper instruction covering the topic, in the place of the defective instruction that was offered, there was error in affirming the judgment of the trial court.

Judgment reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE MCKENNA and MR. JUSTICE HOLMES dissent.